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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

SOUTHWEST MARINE, INC.,
PETITIONER,

v.

SAN DIEGO BAYKEEPER, THE NATURAL RESOURCES DEFENSE COUNCIL AND KENNETH J. MOSER,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a Clean Water Act citizen suit notice letter that does not identify the activity alleged to violate the defendant's NPDES permits satisfies the jurisdictional prerequisites to suit established by 33 U.S.C. § 1365(b)(1)(A)?

2. Whether the Clean Water Act prohibits a federal court from imposing more stringent requirements on industrial operations by injunction and other remedies than those imposed by permits that were lawfully issued by the environmental agency responsible for implementing the Act?

PARTIES TO THE PROCEEDING

The petitioner is Southwest Marine, Inc. The respondents are the Natural Resources Defense Council, San Diego BayKeeper and Kenneth J. Moser.

CORPORATE DISCLOSURE

Southwest Marine, Inc. is a California corporation. Southwest Marine, Inc. is a wholly-owned subsidiary of United States Marine Repair, Inc., a privately held company. No publicly held company owns ten percent or more of Southwest Marine, Inc.'s stock.

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Southwest Marine, Inc. ("Southwest Marine") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 236 F.3d 985. The order of the district court lifting the stay of the injunction against Southwest Marine (*id.* at 36a-39a) is unreported. The order of the district court entering a limited stay of several provisions of the injunction against Southwest Marine (*id.* at 40a-44a) is unreported. The judgment of the district court ordering injunctive relief, a civil penalty and attorneys' fees against Southwest Marine (*id.* at 45a-46a) is unreported. The findings of fact and conclusions of law of the district court (*id.* at 47a-63a) is unreported. The order of the district court first awarding injunctive relief and a civil penalty against Southwest Marine (*id.* at 64a-76a) is unreported. The order of the district court denying Southwest Marine's motion for summary judgment (*id.* at 77a-98a) is unreported. The order of the district court denying Southwest Marine's motion to dismiss for lack of subject matter jurisdiction (*id.* at 99a-107a) is reported at 945 F. Supp. 1330.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

33 U.S.C. § 1365.

33 U.S.C. § 1319(d).

40 C.F.R. § 135.3.

(The full text of these provisions appears in Pet. App. 108a-113a.)

STATEMENT OF THE CASE

I. REGULATORY BACKGROUND

Congress enacted a series of amendments, now commonly known as the Clean Water Act ("CWA"), to the Federal Water Pollution Control and Prevention Act in 1972. 33 U.S.C. §§ 1251-1386. Section 301 of the Clean Water Act prohibits all discharges of pollutants into the nation's waters except as authorized by the Act. 33 U.S.C. § 1311(a). Congress then expressly delegated responsibility for determining what discharges to permit, and under what circumstances, to the Administrator of the Environmental Protection Agency ("EPA"). 33 U.S.C. § 1342(a). The process by which EPA issues such permits is called the National Pollutant Discharge Elimination System ("NPDES"). EPA may in turn delegate the authority to issue NPDES permits to an approved State agency or program that conforms to federal guidelines. 33 U.S.C. § 1342(b). The NPDES process initially governed only "point source" discharges, but was expanded in 1987 to cover pollutants carried into surface waters by storm water runoff as well. *See* 33 U.S.C. § 1342(p).

The holder of a federal or State NPDES permit is subject to enforcement actions by the Administrator of the EPA and any appropriate State officials for failure to comply with the terms of the permit. 33 U.S.C. §§ 1319, 1342(b)(7). The Act also has a "citizen suit" provision allowing private citizens to bring a civil action against any person "alleged to be in violation of" the terms of a federal or state NPDES permit. 33 U.S.C. § 1365(a)(1).

Before initiating such an action, however, a potential citizen plaintiff must provide at least sixty days notice "of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation or order . . . ." 33 U.S.C. § 1365(b)(1)(A). EPA has established by regulation

that the notice letter must include "sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice." 40 C.F.R. § 135.3(a). This Court has held that citizen suit notice provisions like this one must be strictly construed and applied in order to protect Congress's decision to vest primary enforcement responsibility in the appropriate administrative agencies, and in order to give the recipient an opportunity to comply voluntarily with the law. *See, e.g., Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989) (interpreting identical provision in the Resource Conservation and Recovery Act).

The State of California has developed an EPA-authorized NPDES permit program. *See* 39 Fed. Reg. 26061 (1974); California Water Code §§ 13160-13169 and 13200-13260. Point source discharges into California waters are governed by permits issued by nine Regional Water Quality Control Boards ("RWQCB") across the State. California Water Code § 13200. California elected to issue a single, statewide "General Industrial Permit" in 1991 for all industrial storm water discharges requiring a permit (except discharges relating to construction activity). Pet. App. 3a.

II. HISTORY OF THIS LITIGATION

Petitioner Southwest Marine is a shipyard operator in San Diego, California. It applied for and received an NPDES point source permit from the RWQCB in 1983, and storm water coverage under the General Industrial Permit in 1992. Pet. App. 2a-3a. California's General Industrial Permit also required petitioner to develop and implement a "Storm Water Pollution Prevention Plan" and "Storm Water

Monitoring and Reporting Plan." Pet. App. 4a. Petitioner submitted its storm water plan to the RWQCB in December, 1992. Pet. App. 5a. The General Industrial Permit governing storm water discharges in California was amended several times after 1991, and eventually was superseded in the area relevant to this litigation by specific storm water requirements adopted by the San Diego RWQCB in May 1997. Pet. App. 7a. Petitioner's operations are currently governed by a comprehensive permit designed specifically for shipyards and adopted by the San Diego RWQCB in October 1997. *See id; see also* Appellant's Excerpt of Record ("ER") 249-428.

On April 30, 1996, respondents San Diego BayKeeper and the Natural Resources Defense Council sent a letter to petitioner captioned "Notice of Intent to Sue for Violations of the Clean Water Act." Pet. App. 28a. That letter referenced both of petitioner's then-current permits, and stated that the "[permit] requirements with which we believe Southwest Marine . . . ha[s] failed to comply are set forth in [Attachments 1 and 2] of this letter." Pet. App. 29a. Those attachments, in turn, listed several specific provisions of petitioner's point source permit and the General Industrial Permit and recited (essentially verbatim) what those provisions prohibited or required. Pet. App. 33a; ER 118-20. One of the General Industrial Permit provisions listed in Attachment 2 required the "development and implementation" of a storm water plan "describing the storm water management controls appropriate for the facility (for example, storm water pollution prevention personnel, preventive maintenance, good housekeeping, spill prevention and response, storm water management practices, erosion and sediment controls, employee training, and inspections)." Pet. App. 33a. The letter and its attachments contained no factual information about what specific actions or activities of petitioner were alleged to violate the listed provisions.

Respondents filed this lawsuit on August 27, 1996. Pet. App. 6a. The district court generally had jurisdiction over the action pursuant to 28 U.S.C. § 1331, although (as explained below) it did not have jurisdiction to entertain particular allegations of Clean Water Act violations about which petitioner did not receive adequate notice.

Petitioners moved to dismiss the complaint for failure to comply with the Clean Water Act's citizen suit notice requirements. Citing *Hallstrom*, the district court acknowledged that adequate notice was a jurisdictional prerequisite to filing suit, and that the purpose of the notice letter was "(1) to allow the alleged violator time to come into compliance with the CWA, (2) to give the alleged violator an opportunity to negotiate a resolution to the dispute, and (3) to give state and federal environmental regulatory agencies an opportunity to enforce their laws and regulations." Pet. App. 102a-103a (citing *Hallstrom*, 493 U.S. at 29). The district court nonetheless held that the notice letter was sufficient because the court interpreted that letter as alleging only that petitioner had failed to develop and implement a storm water plan that was facially adequate under the terms of petitioner's permits. *Id.* at 104a. The court concluded, for example, that "[t]he defendant's failure to prepare and implement legally sufficient environmental compliance plans is the activity that constitutes the violation" and that "the letter adequately describes the location of the alleged violations because the violations are within the [plans] themselves." *Id.* at 104a-105a.

Believing that respondents' claims were therefore limited to the legal sufficiency of its storm water plans, petitioner moved for summary judgment. Pet. App. 77a-98a. Contradicting its earlier holding that the only alleged violations were "within the [plans] themselves," however, the district court held that there were disputed issues of material fact concerning both the facial sufficiency of

petitioner's storm water plans and whether petitioner was adequately *implementing* those plans. Pet. App. 87a- 98a.

The district court then conducted a month-long trial at which the respondents presented wide-ranging evidence about numerous perceived deficiencies in petitioner's efforts to prevent storm water pollution, and about the overall environmental condition of petitioner's property and the San Diego Bay in general. After trial, the district court held that the terms of petitioners' storm water plans were adequate, but that petitioner had violated its permits and the Clean Water Act by failing to implement those plans adequately.[1] The district court then imposed elaborate injunctive relief, ordering petitioner (among other things) to: (1) test storm water for pollutants before releasing them into the Bay, (2) sweep open areas after every shift, (3) conduct testing of the water column beneath each vessel on which blasting or painting operations are being conducted, (4) capture *all* storm water runoff from its piers and (5) replace its existing asphalt berms for capturing storm water runoff with concrete berms. Pet. App. 9a; 23a-24a. Petitioner's current storm water permit does not require any of these measures. The district court also imposed a civil penalty of $799,000, which it allowed petitioner to set off against the expenses of complying with the injunction. Pet. App. 26a.

On appeal, petitioner challenged both the sufficiency of the original notice letter and the propriety of the district court's injunction and penalty assessment. The Ninth

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[1] The district court found no violation of petitioner's point source permit. *See, e.g.*, Pet. App. 65a ("[T]his Court finds that Defendant's implementation/enforcement of its storm water prevention plans has been inadequate."); Pet. App. 62a ("The question presented at trial was whether the storm water coming from Defendant's leasehold facility had a causal connection to the environmental condition of that offshore habitat."); *see also* Pet. App. 47a-63a (listing the district court's findings of fact and conclusions of law).

Circuit affirmed. The court reasoned that respondents' notice letter was sufficient because it "alleges that defendant failed to implement an adequate [storm water plan], including a 'good housekeeping' provision," and that respondents' eventual allegations at trial could be captured by a broad understanding of the phrase "good housekeeping." Pet. App. 15a-16a. The Ninth Circuit also pointed to the fact that petitioner revised its plan and some of its operating procedures during the course of this litigation as evidence that it "obviously understood at least some of the alleged violations." Pet. App. 16a.

Considering the propriety of the district court's injunction, the Ninth Circuit acknowledged that "a district court's equitable powers under the CWA are limited to enforcing standards, limitations and orders that have been violated" and that a district court may not "exercise its general equitable authority to override the terms of a properly issued permit." Pet. App. 22a (citing 33 U.S.C. § 1365(a) and *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 320 (1981)). Nonetheless, the court concluded that the district court could impose more stringent requirements than petitioner's existing, duly authorized NPDES permits as long as those additional requirements were "reasonably calculated to 'remedy an established wrong'" and "consistent with, and complementary to, existing permit requirements." Pet. App. 22a –23a (citation omitted).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit decided two issues of national significance in a manner that conflicts with this Court's established precedents. If left uncorrected, these serious errors will transform the administration of the Clean Water Act in the Ninth Circuit, upsetting the delicate balance struck by Congress between public and private enforcement of that Act and permitting the federal courts to usurp the policymaking discretion that Congress specifically entrusted

to the Environmental Protection Agency and its delegated State agencies.

First, the Ninth Circuit adopted an interpretation of the Clean Water Act's citizen suit notice provisions that eliminates all meaningful judicial scrutiny of the adequacy of that notice. The Ninth Circuit's reasoning renders the notice requirement an empty formality, and cannot be reconciled with this Court's instructions in *Hallstrom* and *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), that the citizen suit notice requirements in federal environmental statutes serve important statutory purposes and must be strictly construed and applied.

Second, the Ninth Circuit held that a district court may impose different and more stringent requirements on a Clean Water Act defendant by injunction than are imposed by the defendant's existing NPDES permits, so long as the injunction's additional requirements are "consistent with" and "complementary to" the permit. That reasoning conflicts with this Court's clear and repeated holdings in *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981), and *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), that the Clean Water Act's elaborate regulatory scheme completely occupies the field – and that, therefore, "[f]ederal courts lack authority to impose more stringent effluent limitations under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme." *City of Milwaukee*, 451 U.S. at 320.

Petitioner respectfully suggests that both of these holdings merit the exercise of this Court's certiorari jurisdiction.

I. THE NINTH CIRCUIT'S HOLDING THAT THE NOTICE LETTER PROVIDED IN THIS ACTION WAS SUFFICIENT CANNOT BE RECONCILED WITH THE CLEAN WATER ACT OR THIS COURT'S PRECEDENTS

A. The Clean Water Act's Citizen Suit Notice Provisions Serve Important Statutory Goals, And This Court Has Held That They Should Be Strictly Construed And Applied

Congress provided that the primary enforcement mechanism for the Clean Water Act would be the NPDES permitting process and enforcement actions brought by EPA and corresponding State agencies. *See* 33 U.S.C. §§ 1319, 1342(b)(7). In the absence of agency enforcement, the Act does permit citizen suits. 33 U.S.C. § 1365(a)(1). But the Act and its implementing regulations require that any prospective citizen suit plaintiff first provide specific notice of its allegations 60 days in advance to the defendant and to regulators. 33 U.S.C. § 1365(b)(1)(A); 40 C.F.R. § 135.3(a).

As this Court has recognized, the citizen suit notice provision in the Clean Water Act mirrors identical provisions in many federal environmental statutes, *Hallstrom*, 493 U.S. at 23 & n.1, and serves several important goals. "First, notice allows Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits." *Id.* at 29. Without an effective notice requirement, the primary enforcement role that Congress intended to confer on EPA and its delegates would be compromised. *See Gwaltney*, 484 U.S. at 60 ("The bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action."). Agency enforcement is also more efficient because "an agency may be able to compel

compliance through administrative action, thus eliminating the need for any access to the courts." *Hallstrom*, 493 U.S. at 29.

Second, the notice requirement "gives the alleged violator 'an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit.'" *Id.* (quoting *Gwaltney*, 484 U.S. at 60). Consensual resolution of a potential citizen suit serves the twin statutory goals of ending or remedying the alleged environmental damage more quickly than could be achieved by litigation, and avoiding the burden that constant litigation would place on both NPDES permit holders and the courts.

In recognition of these important policies, this Court held in *Hallstrom* that citizen suit notice requirements should be strictly construed and applied. This Court even went so far as to dismiss an action that "consumed the time and energy of the District Court and the parties for nearly four years" because the plaintiff had not notified EPA and the State regulators until the action was already underway. *Id.* at 32.

B. The Clean Water Act Requires Specific Notice Of The Factual Circumstances Alleged To Constitute A Violation of An NPDES Permit

EPA is the administrative agency charged by Congress with enforcing the Clean Water Act, and its interpretations of that Act's requirements are therefore entitled to deference. *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984). EPA has promulgated a regulation that explains in detail the information that prospective citizen suit plaintiffs must supply in the notice letter required by 33 U.S.C. § 1365(b)(1)(A). That regulation provides that the notice letter must include, among other things, "sufficient information to permit the recipient to identify" *both* "the

specific standard, limitation, or order alleged to have been violated" and "the activity alleged to constitute a violation." 40 C.F.R. § 135.3(a).

That distinction is both intentional and important. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 697-98 & n.11 (1995) (construing terms in list so that they "retain independent meanings" in light of Court's "reluctance to treat statutory terms as surplusage"); *Freytag v. Commissioner*, 501 U.S. 868, 877 (1991) ("Our cases consistently have expressed 'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.'") (citations omitted). Obviously, notice of the NPDES permit condition alleged to be violated is not the same thing as notice of the substantive activity alleged to violate that condition. And, just as obviously, the statutory purposes underlying the citizen suit notice provision cannot be effectuated unless the relevant administrative agencies and the prospective defendant all receive notice of both.

C. The Ninth Circuit's Holding That The Notice Given In This Case Was Sufficient Cannot Be Reconciled With The Governing Regulations, And Transforms The Citizen Suit Notice Requirements Of The Clean Water Act Into An Empty Formality

As the Ninth Circuit's discussion makes clear, however, the notice letter sent by respondents in this case was completely devoid of any information about the actual activities that respondents believed to constitute a violation of petitioner's NPDES permits. *See* Pet. App. 14a-15a; Pet. App. 28a-35a Instead, that letter simply made the conclusory allegation that "the information currently available to us indicates that Southwest Marine and the Port District have violated NPDES General Permit No. CA5000001 governing storm water discharges associated with industrial activities in California." Pet. App. 29a. The letter then stated that "[t]he General Industrial Permit

requirements with which we believe Southwest Marine and the Port District have failed to comply are set forth in Attachment 2 to this letter." *Id.* Attachment 2, in turn, is nothing more than a list of six sections of the General Industrial Permit and a nearly verbatim recitation of what they require (i.e., that petitioner "develop[] and implement[]" a storm water plan pursuant to certain guidelines). *Id.* at 32a-33a.

That notice letter may have identified "the specific standard, limitation, or order alleged to have been violated," but it did not even attempt to further identify "the activity alleged to constitute a violation." 40 C.F.R. § 135.3(a). As the district court initially seemed to understand, that patent deficiency should have been fatal to all of respondents' claims – other, perhaps, than claims alleging nothing more than petitioner's complete failure to adopt a storm water plan that facially complied with the law (in which case the activity alleged to violate the condition would be contained "within the [plans] themselves." Pet. App. 104a-105a.

To support its holding that the notice letter provided by respondents was nonetheless sufficient to support the wide-ranging allegations ultimately litigated in this case, the Ninth Circuit focused on one isolated phrase in Attachment 2 to the notice letter. One of the General Industrial Permit sections listed in that Attachment was the provision requiring "development and implementation" of a storm water plan "describing the storm water management controls appropriate for the facility (for example, storm water pollution prevention personnel, preventive maintenance, *good housekeeping*, spill prevention and response, storm water management practices, erosion and sediment controls, employee training, and inspections)." Pet. App. 32a (emphasis added). The Ninth Circuit reasoned that, because the notice letter alleged that petitioner had failed to "implement[]" a storm water plan containing a "good housekeeping" provision, the petitioners had therefore received adequate notice of any later

allegations that could plausibly be subsumed in an expansive reading of the phrase "good housekeeping." Pet. App. 15a.

The Ninth Circuit's reasoning completely nullifies the distinction, carefully expressed by EPA in the applicable and binding regulations, between notice of the permit provision alleged to be violated and notice of the actual activities alleged to constitute such a violation.[2] A careful reading of the notice letter reveals that it did not even purport to convey any information other than a list of the permit provisions allegedly violated by petitioner. The text of the letter stated that Attachment 2 is a list of the permit provisions "with which we believe Southwest Marine . . . ha[s] failed to comply." Pet. App. 29a. One of those listed provisions required petitioner to "implement[]" a plan containing a "good housekeeping" provision. *Id.* But even if that permit provision is fairly read as a roundabout way of saying that petitioner must engage in "good housekeeping," the notice letter provided no further information beyond the reference to the permit provision itself and the naked allegation that it was violated.

The Ninth Circuit also compounded its error by permitting the phrase "good housekeeping" to encompass such a broad array of allegations and evidence that the contents of the notice letter clearly did not constrain respondents' trial presentation in any way. At trial, respondents presented testimony about a hodge-podge of perceived environmental problems at petitioner's facility that ranged from the existence of contaminated sediment around an abandoned marine railway to inadequacies in

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[2] The Ninth Circuit's elaborate justification of the fact that the notice letter failed to reference the terms of petitioner's later-revised storm water plan, Pet. App. 15a, while fair, is a red herring. The point is not that the letter failed to accurately identify the plan (or permit) provisions alleged to be violated, but that it utterly failed to provide any information about the factual activities alleged to constitute such a violation.

petitioner's berms and other structural systems for containing storm water runoff. *See, e.g.*, Pet. App. 91a-98a; Plaintiffs-Appellees' Answering Brief at 15-22, *Natural Resources Defense Council v. Southwest Maine, Inc.*, 236 F.3d 985 (9th Cir. 2000) (Nos. 99-56532, 99-56545). If a notice letter generally alleging that the recipient has failed to engage in "good housekeeping" will support the range of allegations pursued by the respondents in this case at trial, then it is hard to imagine what plausible Clean Water Act allegations it would not support.

And that, of course, is precisely why the Ninth Circuit's holding in this case cannot be reconciled with this Court's decisions in *Hallstrom* and *Gwaltney*. If the citizen suit notice requirements in the Clean Water Act (and so many other federal statutes) are to play their proper and important role in the statutory structure – the role repeatedly described by this Court – then the notice letter must give EPA and the prospective defendant fair warning of what the case will be about. Otherwise, the appropriate regulatory authorities cannot "take responsibility for enforcing environmental regulations," *Hallstrom*, 493 U.S. at 29, and the prospective defendant will have no "opportunity to bring itself into complete compliance with the Act," *Gwaltney*, 484 U.S. at 60. A naked allegation that the defendant violated the terms of its governing NPDES permit provides literally no information at all. Every Clean Water Act case necessarily involves an allegation that the defendant violated the terms of its permit, yet such an allegation without more has never been deemed sufficient notice.[3]

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[3] Although there is disagreement among circuit courts as to whether a plaintiff must provide notice of *each* "activity alleged to constitute a violation" when the activities at issue are of the "same type" or "directly related" to one another, until the Ninth Circuit's decision in this case, no circuit court after *Hallstrom* has dared to eliminate the "activity alleged" requirement altogether. *Contrast Save Our Health Organization v. Recomp of Minnesota, Inc.*, 37 F.3d 1334, 1337-38 (8th

By holding that a mere generic recitation of the terms of the defendant's permit is sufficient notice, the Ninth Circuit transformed the citizen suit notice requirement into an empty formality and exposed NPDES permit holders to a potential flood of citizen suits. Any prospective citizen plaintiff can send such a letter, whether they have any factual information indicating a violation of the recipient's permits or not. After waiting sixty days, the citizen plaintiff can file a lawsuit that – if the Ninth Circuit's holding stands – will always survive a motion to dismiss. Acting as a self-appointed investigative watchdog, the citizen plaintiff may then initiate an open-ended, costly and disruptive discovery fishing expedition (including, if this case is any guide, frequent on-site inspections of the defendant's facilities). Those efforts will inevitably produce disputed factual issues, allowing the citizen plaintiff to survive summary judgment and subject the defendant to the expense of a trial. That is not the carefully circumscribed role that Congress

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Cir. 1994) (holding that district court lacked jurisdiction under Clean Air Act over three particular odor concentration violations where plaintiffs gave notice of other odor violations but failed to include allegations of these particular odor violations in notice letter*) and Atlantic States Legal Foundation, Inc. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473, 478 (6th Cir. 1995) (holding that district court lacked jurisdiction under Emergency Planning and Community Right-to-Know Act over alleged 1991 violations where plaintiffs gave notice of alleged violations from 1987-1990 but failed to specifically mention any violation in 1991) *with Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.*, 50 F.3d 1239, 1248-1250, 1252 (3d Cir. 1995) (holding that under the CWA, a citizen plaintiff's initial notice of discharge violations was sufficient to encompass additional *"directly related"* discharge violations of the *"same type* (same parameter, same outfall)" and *"directly related"* violations of "monitoring, reporting, and recordkeeping requirements for that same parameter at that outfall") (emphasis added*) and Atlantic States Legal Foundation, Inc. v. Stroh Die Casting Co.*, 116 F.3d 814 (7th Cir. 1997) (holding that under CWA notice letter which specifically alleged that on several occasions defendant had exceeded the daily maximum discharge limits for specific pollutants from a certain outfall was sufficient to include later discharges rerouted from that point source to a newly-created outfall).

envisioned for citizen suits under the Clean Water Act, and that this Court described in *Hallstrom* and *Gwaltney*.

D. The Ninth Circuit's Holding That A Vague Notice Letter Can Be Cured By Extrinsic Evidence Of The Defendant's Reaction Is Inconsistent With The Congressional Policies Underlying The Notice Requirement As Explained By This Court

The Ninth Circuit also held, in effect, that the content of the notice letter could be supplemented (retroactively) by reference to any later steps that petitioner took to improve its environmental compliance systems. Pet. App. 16a. The court reasoned that petitioner "obviously understood at least some of the alleged violations" because it "completely revised its [storm water plans] within four months, adding sections that specifically made reference to the requirements that Plaintiffs had identified," and because it "made substantial changes to its facility and operations during the pendency of this litigation." *Id.*

As an initial matter, the Ninth Circuit's reference to the "substantial changes to [petitioner's] facility and operations *during the pendency of this litigation*" perfectly illustrates the court's dismissive attitude toward the citizen suit notice requirement. *Id.* (emphasis added). Even if those structural and operational changes were in fact inspired or provoked by this litigation, they did not occur until after the respondents elaborated upon their "implementation" allegations in the complaint and at trial. The only changes that petitioner made between receipt of the notice letter and the filing of the complaint were to the facial terms of its storm water plans, which the district court ultimately found to be in compliance with petitioner's permits and the Clean Water Act.[4] The Ninth Circuit's reliance on changes in

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[4] Petitioner's amendment of its existing storm water plans between the notice letter and the filing of the complaint illustrates how the citizen suit process is supposed to work, and why the notice provision is

petitioner's implementation policies *after the complaint was filed* (and respondents' allegations were greatly elaborated) to show that petitioner "understood" the original notice letter to cover those matters is simply absurd, and transforms the notice letter into little more than a placeholder for the evidence eventually adduced at trial.

In any event, the Ninth Circuit's inference that any subsequent changes by petitioner must have been "in response to" the notice letter, and that they therefore demonstrate that petitioner "obviously understood at least some of the alleged violations," is flawed on many levels. Pet. App. 15a. First, NPDES permit holders like petitioner have complex environmental systems in place and are constantly reevaluating and seeking to improve them. Petitioner's efforts to comply with the San Diego RWQCB's first permit that specifically dealt with storm water discharges (adopted after the filing of this lawsuit) obviously occasioned many of the changes implicitly referenced by the Ninth Circuit. Pet. App. 50a. Second, even if receiving a notice letter does provoke the recipient to reexamine and improve its environmental practices, that certainly does not establish that any problems identified and corrected by that review were fairly identified by the notice letter itself. The Ninth Circuit's inference that all changes made after litigation has been threatened necessarily demonstrate that the defendant must have "understood" the notice letter is therefore factually implausible, even if it does not

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important. As the district court initially recognized, the *only* thing that respondents' notice letter gave petitioner fair notice of was an allegation that the facial terms of its storm water plans might not comply with the requirements of the applicable permits. *See supra* at 5. Petitioner successfully corrected that perceived defect before the initiation of this lawsuit. Had respondents provided intelligible notice about the substance of their eventual "implementation" allegations in the letter, petitioner might have been able to correct them as well and spare everyone the expense of this litigation. As this Court has recognized, that is exactly the point of the notice requirement. *Gwaltney*, 484 U.S. at 60; *Hallstrom*, 493 U.S. at 29.

technically violate the ban on evidence of subsequent remedial measures found in Rule 407 of the Federal Rules of Evidence.

More importantly, however, the Clean Water Act requires that citizen plaintiffs deliver effective notice not only to the potential defendant but also to EPA and the appropriate State regulatory authorities. Even if the defendant "understood" a vague (or, as in this case, entirely vacuous) notice letter because of extrinsic information in its possession, that private knowledge obviously cannot cure the defect in the notice given to EPA and the State. And this Court's holding in *Hallstrom* was, precisely, that a deficient notice to the regulators is fatal to any citizen suit, even if the defendant itself has been adequately notified.

Considered as a whole, the Ninth Circuit's analysis of the notice provided in this case eviscerates the citizen suit notice requirement and upsets the balance carefully struck by Congress between public and private enforcement of the Clean Water Act. The Ninth Circuit's reasoning cannot be reconciled with this Court's decisions in *Hallstrom* and *Gwaltney*, and the matter is so essential to the proper administration of the Clean Water Act that it merits review and correction by this Court.

II. THE STANDARD ADOPTED BY THE NINTH CIRCUIT FOR REVIEW OF DISTRICT COURT INJUNCTIONS IN CLEAN WATER ACT CASES IS CONTRARY TO THIS COURT'S PRECEDENTS, AND PERMITS THE FEDERAL COURTS TO USURP THE POLICYMAKING DISCRETION ENTRUSTED TO EPA BY THE CLEAN WATER ACT

A. This Court Has Held, Clearly And Repeatedly, That The Clean Water Act Vests Discretion To Strike The Appropriate Cost-Benefit Balance For Water Pollution Cases In EPA And Its Designates, Not The Federal Courts

This Court has repeatedly recognized that the Clean Water Act is a careful and comprehensive effort by Congress to balance the various interests and values associated with the regulation of industrial water pollution, and that courts cannot be permitted to interfere with that regulatory structure under the guise of common law rulemaking or the exercise of equitable discretion.

In *City of Milwaukee*, this Court held that the Clean Water Act entirely preempts the federal common law of nuisance as it relates to water pollution. This Court explained that the Act was plainly designed by Congress to be "an all-encompassing program of water pollution regulation" and stated that "Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *City of Milwaukee*, 451 U.S. at 317-18. This Court concluded that "[f]ederal courts lack authority to impose more stringent effluent limitations

under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme." *Id.* at 320.

In *International Paper Co. v. Ouellette*, this Court held that the Clean Water Act also preempts State nuisance law to the extent that it attempts to impose liability on an out-of-state source.[5] This Court recognized that the application of "vague" and "indeterminate" nuisance law standards would "undermine the important goals of efficiency and predictability in the permit system." *Ouellette*, 479 U.S. at 496. "It would be extraordinary for Congress," this Court concluded, "after devising an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure." *Id.* at 497.

At the heart of this Court's decisions in *City of Milwaukee* and *Ouellette* is a recognition that the Clean Water Act entrusts a critical balancing of costs and benefits to the discretion of EPA and designated state permitting authorities. "By establishing a permit system for effluent discharges," this Court held, "Congress implicitly has recognized that the goal of the CWA – elimination of water pollution – cannot be achieved immediately, and that it cannot be realized without incurring costs." *Ouellette*, 479 U.S. at 494. EPA and its designates "issue[] permits according to established effluent standards and water quality standards, that in turn are based upon available technology, 33 U.S.C. § 1314, and competing public and industrial uses, § 1312(a)." *Id.* And those permits will, inevitably, sometimes reflect policy choices that a particular citizen plaintiff (and even a particular federal court) might consider insufficiently protective of the environment. But

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[5] The Act contains a savings clause that permits States to impose more stringent limitations on in-state dischargers as a matter of State law. *See* 33 U.S.C. §§ 1370, 1365(e).

this Court has made it clear that, "[a]lthough a federal court may disagree with the regulatory approach taken by the agency with responsibility for issuing permits under the Act," that court may not substitute its judgment for that of the agency by fashioning a supplemental common law remedy. *City of Milwaukee*, 451 U.S. at 323.

That division of responsibility is also clearly reflected in the Clean Water Act's enforcement provisions. When a plaintiff prevails in a citizen suit to enforce compliance with an effluent standard (including a permit condition) or a governmental order with respect to such a standard, Section 505(a) of the Act authorizes a district court *"to enforce such an effluent standard or limitation, or such an order."* 33 U.S.C. § 1365(a) (emphasis added). The Act does not give the court jurisdiction to modify, rewrite, or supplement the standards and limitations promulgated by EPA and its designates; it merely grants jurisdiction to enforce them. And, unlike so many other comparable federal statutes, the Act pointedly *does not* give the district court jurisdiction to grant "other appropriate relief" or the like.[6]

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[6] There is, in fact, only one area in which this Court has allowed federal courts enforcing the Clean Water Act to exercise their traditional equitable discretion. In *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), a district court held that the U.S. Navy's use of a bombing range off the coast of Puerto Rico required an NPDES permit. The district court did not, however, enjoin the Navy from using that range until the necessary permit had been obtained. This Court held that the district court retained the equitable discretion to decline to issue an injunction, in part because the Clean Water Act provides for other "means of ensuring compliance," such as "fines and criminal penalties." *Romero-Barcelo*, 456 U.S. at 314. But allowing a federal court to abstain from using its equitable powers to enforce the NPDES permitting process when necessary to ensure military preparedness is obviously a far cry from allowing the court to issue an injunction that actively interferes with that process, as the Ninth Circuit did in this case.

B. The District Court's Injunction In This Case Essentially Rewrote Petitioner's Governing NPDES Permits And Usurped The Proper Role And Authority of the San Diego Regional Water Quality Control Board

The injunction entered by the district court in this case accomplished precisely what this Court warned against in *City of Milwaukee* and *Ouellette*: it required more stringent water pollution prevention requirements than were imposed after careful consideration by EPA's designee, the San Diego Regional Water Quality Control Board -- and thereby substituted the district court's judgment for that of the expert administrative agency charged by Congress with administering the Clean Water Act. None of the "improved practices," Pet. App. 65a, ordered by the district court have anything to do with petitioner's governing NPDES permits, and several are actively inconsistent with those permits in exactly the same way as the common law nuisance judgments invalidated by this Court in *City of Milwaukee* and *Ouellette*.

The most glaring example is the district court's requirement that petitioner adopt a storm water diversion system that captures 100% of the storm water flowing off all of petitioner's piers. *See* Pet. App. 58a, 70a. At the time the district court issued its injunction, petitioner's NPDES permit did not require it to capture *any* storm water. Trial Exhibit ("TE") 729 (ER 249); TE 945 (ER 1661). A more stringent revised permit adopted in May 1997 now requires petitioner to capture only the first quarter-inch of storm water from "high risk" areas. The San Diego RWQCB arrived at that quarter-inch requirement (and the limitation to "high risk" areas) after public hearings in which respondents participated, and a San Diego Superior Court judge later upheld it as a "reasoned compromise between the most conservative and expensive measure (one-half inch), and an inadequate measure which would allow a

greater amount of polluted runoff into the Bay (one-tenth inch)." *Id.*; *National Steel & Shipbuilding Co. v. California State Water Resources Control Bd.*, Case No. 724222 (Cal. Oct. 18, 1999). Petitioner in fact has a state-of-the-art drainage system that does capture a full half-inch of storm water runoff from "high risk" areas of its facility, including one of the piers. By requiring petitioner to capture 100% of the runoff, and to extend the system to all piers (whether they or not they are "high risk" areas), the district court did not merely substitute its opinion for the considered judgment of the agency; it imposed a requirement that the agency found to be so burdensome that it was not even within the appropriate range of consideration. *See* Pet. App. 42a-43a ("The Court acknowledges that Defendant's existing stormwater containment system exceeds current regulatory requirements.").

Other requirements imposed by the district court similarly "ratchet up" the requirements found in petitioner's NPDES permits. For example, those permits require petitioner to capture storm water from two storm events per year, and test it for significant pollutants. Clerk's Record ("CR") 23 (ER 123). The district court ordered petitioner to capture and test the runoff from *every* storm and test it before releasing it into the bay. Pet. App. 55a. The district court required petitioner to test the surrounding water column in four different locations and at multiple depth intervals whenever conducting sandblasting or painting operations on any vessel, even though such measures are not required by petitioner's permits – and self-evidently have absolutely nothing to do with storm water pollution at all. Pet. App. 56a-57a. And the court also ordered petitioner to replace all the existing asphalt berms in its facility with concrete ones, even though the use of asphalt berms is not prohibited by petitioner's permits (and petitioner's storm water diversion and capture system is, in

fact, already substantially more elaborate and effective than required by the RWQCB). Pet. App. 70a-71a.

As petitioner explained to the Ninth Circuit, the inherent inconsistency of the district court's holding further illustrates that the district court was not interpreting or "enforcing" the requirements of petitioner's existing permits but rather creating new ones out of whole cloth. The district court held that petitioner's existing storm water plans were *already* adequate to conform to the requirements of its NPDES permits. Pet. App. 65a. The district court's decision to impose additional elaborate additional requirements can therefore be understood only as a determination that the terms of petitioner's permits are not stringent enough to adequately protect the environment, in the district court's own personal judgment.

And that is precisely the import of the district court's forthright response when petitioner protested that the court's injunction was impermissibly modifying the terms of petitioner's permits:

> THE COURT: All I got from the Defendants was, number one, I don't have the power to do anything I want to do because I'm bound by the NPDES permit. And that's on appeal, and my present position is that's not the law, and I don't consider myself bound by the NPDES permit. . . . *I don't think the NPDES permit, which is the product of a state agency, is the Supreme Court of the United States on the Clean Water Act.* And this is an Article 3 court, a District Court, and I'll take my reversals from the Ninth [Circuit] and from the Supreme Court but not by the NPDES.
>
> ....

> *I don't recognize that this Court is limited by your NPDES permit. I reject that position.* I believe that this Court under the Clean Water Act has the power to order corrective action necessary to reasonably protect the environment, and that's what I've done.

Reporter's Transcript ("RT") 3/6/00 at 7-8, 66 (Appellees' Supplemental Excerpts of Record ("SER") 1319-1320, 1355) (emphasis added).

With due respect to the district court, that approach to injunctive relief under the Clean Water Act cannot be reconciled with this Court's decisions in *City of Milwaukee* and *Ouellette*.

C. The Deferential Standard Adopted By The Ninth Circuit Permits District Courts To Impose More Stringent Water Quality Standards Than EPA And Its Designees, In Direct Conflict With This Court's Decisions In *City Of Milwaukee* and *Ouellette*

The Ninth Circuit nonetheless affirmed the district court's injunction on the novel theory that federal courts could impose additional requirements or limitations on NPDES permit holders as long as those requirements were "reasonably calculated to 'remedy an established wrong'" and "consistent with, and complementary to, existing permit requirements." Pet. App. 22a-23a. (citations omitted). That standard reflects a serious misunderstanding of the statutory structure, and of this Court's decisions in *City of Milwaukee* and *Ouellette*.

The Ninth Circuit appears to have believed that the district court's additional requirements were "consistent with, and complementary to, existing permit requirements" as long as it was possible for petitioner to comply with both its existing permits and the injunction simultaneously. But this Court recognized in *City of Milwaukee* and *Ouellette* that the Clean Water Act preempts all other legal authority

(unless specifically excepted in the Act's "savings" clause) to the extent that it imposes requirements that are more stringent than, or in addition to, what the NPDES permit itself requires. The scope of that preemption rules out any possibility that a district court could "supplement" the requirements of an NPDES permit by injunction without substituting its own judgment for that of the agency.

"In imposing stricter effluent limitations," this Court wrote in *City of Milwaukee*, "the District Court was not 'filling a gap' in the regulatory scheme, it was simply providing a different regulatory scheme." 451 U.S. at 324 n.18. The same is true of the district court's injunction in this case. The district court's command that petitioner capture all of the storm water running off its piers is not "consistent with" or "complementary to" the San Diego RWQCB's requirement that it capture the top quarter inch of such storm water, for example, in any relevant sense. It is simply different, and more stringent. The Ninth Circuit's conclusion to the contrary is inconsistent with this Court's holdings in *City of Milwaukee* and *Ouellette* that the Clean Water Act and the NPDES permitting process occupy the entire field.

In an ironic twist, the Ninth Circuit's holding in this case actually appears to be that, although the Clean Water Act protects the expert judgment of EPA from interference by judges seeking to impose more stringent requirements under other state or federal law, it somehow permits such interference by judges purporting to enforce the Clean Water Act itself. That cannot be, and is not, the law.

D. The District Court's Civil Penalty Award Should Be Vacated Along With The Injunction

In addition to the injunction described above, the district court imposed a civil penalty on petitioner in the amount of $799,000. The district court based that calculation on a judgment that petitioner should pay $1000 of penalties per day that it was violating its permits, and the conclusion

that petitioner had failed to implement its permit requirements adequately for 799 consecutive days, from the date plaintiffs filed their lawsuit (August 27, 1996) until the day before trial (November 3, 1998). Pet. App. 73a.

As petitioner explained to the Ninth Circuit, that conclusion lacks any evidentiary foundation in the record, and is clearly erroneous. The district court explicitly held that petitioner's storm water plans are themselves adequate to satisfy the requirements of petitioner's permits. Pet. App. 65a. And respondents did not even introduce evidence of "implementation" violations occurring on each of the 799 days between the date the respondents filed their lawsuit and the beginning of trial. Even if every implementation defect alleged by respondents is credited, they would still not add up to any number approaching 799 independent days of violation.

Furthermore, the civil penalty statute requires the district court to consider "the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." 33 U.S.C. § 1319(d). But, as the district court itself conceded, whatever post-complaint violations the court found to exist are not severe. Pet. App. 72a. The district court's opinion also repeatedly acknowledged petitioner's good-faith efforts to comply with its permit obligations. Pet. App. 65a, 72a. Especially when compared to the amount of civil penalties awarded in other cases, the district court's imposition of a $799,000 amount is an excessive and unjustified abuse of discretion. Indeed, petitioner is unaware of a single case in which civil penalties were imposed in the absence of multiple, documented violations of numeric effluent standards – a showing that respondents utterly failed to make.

The Ninth Circuit held that petitioner's challenges to the penalty calculation were essentially moot, because the district court allowed petitioner to set off the penalty against the multi-million dollar cost of complying with its injunction. Pet. App. 26a. "Accordingly, anticipated alterations, when offset against the $799,000 civil penalty, will reduce the penalty to zero." *Id.* Because the injunction exceeded the district court's authority, however, the offset relied upon by the Ninth Circuit is illusory. Petitioner respectfully submits that this Court should, after vacating that injunction, therefore set aside the district court's penalty award as well – or, at a minimum, vacate and remand it for reconsideration in light of this Court's opinion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 99-56532, 99-56545
D.C. No. CV-96-01492-RMB

Natural Resources Defense Council; San Diego Baykeeper, Kenneth J. Moser,
Plaintiff-Appellees,

v.

Southwest Marine, Inc.,
Defendant-Appellant

Appeal from the United States District Court
for the Southern District of California
Rudi M. Brewster, District Judge, Presiding

Argued and Submitted
August 10, 2000—Pasadena, California
Filed December 19, 2000

Before: KOZINSKI, GRABER, and FISHER, Circuit Judges.

GRABER, Circuit Judge:

Defendant Southwest Marine, Inc., appeals from the district court's judgment for Plaintiffs Natural Resources Defense Council (NRDC), San Diego Baykeeper, and

Kenneth J. Moser, in their citizen enforcement action under § 505(a) of the Clean Water Act (CWA), 33 U.S.C. § 1365(a). In response to Defendant's challenge, we hold: Plaintiffs have standing to bring this action, Plaintiffs' notice letter was adequate, Defendant's violations were ongoing, the district court's injunctive measures were not an abuse of discretion, and the district court's civil penalty was not an abuse of discretion. Accordingly, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Defendant operates a large shipyard on San Diego Bay. Its principal business is repairing and maintaining marine vessels. Among other things, Defendant's shipyard removes old paint from ships and then repaints them. Defendant commonly removes old paint by blasting the ships' hulls with abrasive grit, composed primarily of particles of copper, that is conveyed on streams of compressed air. Defendant uses about 4 million pounds of copper grit per year for blasting old paint from ships and generates about 4,800 pounds of paint waste per year.

Defendant repaints ships with "antifouling paints," which are paints that are formulated to prevent the growth of aquatic organisms, such as barnacles and algae, on the bottoms of ships. Those paints contain compounds that are toxic to aquatic life.

Defendant's shipyard contains five piers, at which ships are moored while they are being repaired, and two floating drydocks, on which ships rest, out of the water, to allow repair, blasting, and repainting of parts that are normally underwater. When Plaintiffs filed their complaint, Defendant also was operating a marine railway, which is a device that is used to pull ships onto the shore for repair.

Shipyards like Defendant's generate large amounts of wastes and pollutants, including paint chips and abrasive grit. Those wastes and pollutants are discharged into adjacent waters through -- among other means -- storm

water runoff, tidal action, leaks, spills, and overspray. A 1993 report by the California Regional Water Quality Control Board showed elevated concentrations of copper, tributyltin, and zinc – all of which are present in the materials used and the wastes generated at Defendant's shipyard – in the sediments adjacent to the shipyard. The report concluded that Defendant appeared to have discharged copper, tributyltin, and zinc into San Diego Bay, that Defendant's management practices appeared to be inadequate to prevent such discharges, and that the discharges might have long-term negative effects on the water quality of the Bay and on its suitability for human use.

Defendant had applied for and received a National Pollutant Discharge Elimination System (NPDES) permit from the California Regional Water Quality Control Board in 1983. In 1992, Defendant had obtained coverage under the State Water Resources Control Board's 1991 General Industrial Permit for storm water discharges. That permit supplemented Defendant's NPDES permit; the storm water permit applied to discharges of pollutants through storm water, and the NPDES permit applied to other discharges.

Both permits required Defendant to develop and implement plans to limit its discharges of pollutants into the Bay. Rather than relying on specific numerical effluent limitations, the permits required Defendant to create and follow "Best Management Practices" (BMPs).[1] Defendant adopted a written BMP plan on January 15, 1992.

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[1] BMPs are

> schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

The storm water permit also required Defendant to develop and implement a Storm Water Pollution Prevention Plan (SWPPP) and a Storm Water Pollution Monitoring Plan (SWPMP). The permit specified that the SWPPP was required to include, among other things:

- a description of sources that might add significant quantities of pollutants to storm water discharges;
- a detailed site map;
- a description of materials that had been treated, stored, spilled, disposed of, or leaked into storm water discharges since November 1988;
- a description of the management practices that Defendant employed to minimize contact between storm water and pollutants from vehicles, equipment, and materials;
- a description of existing structural and nonstructural measures to reduce pollutants in storm water discharges;
- a description of methods of on-site storage and disposal of significant materials;

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40 C.F.R. § 122.2. As described in Defendant's current NPDES permit, BMPs may be "structural" (e.g., tarpaulins and shrouds to enclose work areas, retention ponds, devices such as berms to channel water away from pollutant sources, and treatment facilities) or "non-structural" (e.g., good housekeeping, preventive maintenance, personnel training, inspections, and record-keeping).

- a description of outdoor storage, manufacturing, and processing activities;

- a list of pollutants likely to be present in significant quantities in storm water discharges and an estimate of the annual amounts of those pollutants in storm water discharge;

- a record of significant leaks or spills of toxic or hazardous pollutants to storm water;

- a summary of existing data describing pollutants in storm water discharge;

- a description of Defendant's storm water management controls, including good housekeeping procedures, preventive maintenance, and measures to control and treat polluted storm water; and

- a list of the specific individuals responsible for developing and implementing the SWPPP.

Defendant submitted its SWPPP in December 1992. The SWPPP required Defendant, among other things, (1) to perform daily inspections to ensure that its shipyard was complying with the requirements of its BMP plan, and (2) to maintain records of those inspections.

On April 30, 1996, Plaintiffs sent Defendant a notice letter, as required by 33 U.S.C. § 1365(b)(1)(A), advising Defendant that it was violating the CWA and that Plaintiffs intended to sue under the CWA's citizen enforcement provisions. A copy of the notice letter and its attachments appears as an Appendix at the end of this opinion.

As discussed below, a party who wishes to sue under the CWA's citizen enforcement provisions may not commence an action until at least 60 days after giving notice of intent to sue. On August 27, 1996, more than 60 days after sending their notice letter, Plaintiffs filed this action. Four days earlier, on August 23, 1996, Defendant had submitted a revised SWPPP and SWPMP. Those revised plans addressed, and attempted to correct, many of the shortcomings described in Plaintiffs' notice letter.

In September 1996, Defendant moved to dismiss this action, arguing that Plaintiffs' notice letter did not comply with the CWA's requirements and, in particular, that the letter was not specific enough to inform Defendant of what standards it allegedly had violated. The district court denied Defendant's motion in a published opinion. *Natural Res. Def. Council, Inc. v. Southwest Marine, Inc.*, 945 F. Supp. 1330 (S.D. Cal. 1996).

Defendant then moved for summary judgment, arguing (1) that the district court lacked subject matter jurisdiction because Plaintiffs' allegations of ongoing violations were neither made in good faith nor based on reasonable investigation; (2) that, even if the district court had subject matter jurisdiction, summary judgment was appropriate because Plaintiffs could not prove ongoing violations at trial; and (3) that Plaintiffs' claims were moot.

After continuing the motion to allow more time for discovery, the district court denied summary judgment in an unpublished order. In denying Defendant's motion, the court concluded (1) that it had subject matter jurisdiction because Plaintiffs had alleged continuing violations in good faith; (2) that there were disputed issues of material fact as to whether Defendant (a) had developed an adequate SWPPP and monitoring plan, as required by its storm water permit, and (b) had adequately implemented or was adequately implementing such plans; and (3) that Plaintiffs' action was not moot.

While district court proceedings were pending, Defendant's permits were revised twice. First, Defendant's storm water permit was superseded by a new storm water permit, which took effect May 1, 1997. Second, both the storm water permit and Defendant's NPDES permit were superseded by a new NPDES permit. That permit was issued on October 15, 1997, but was stayed on March 27, 1998, by the Superior Court of the County of San Diego. The superior court lifted that stay later in 1998, and the revised permit became effective at that time.[2]

Defendant also revised a number of its practices related to storm water while this matter was before the district court. Among other things, Defendant revised its BMP plan, as required by its most recent NPDES permit; installed a storm water diversion system covering most (but not all) of its facility; hired a new environmental compliance manager; installed a roof to prevent storm water from reaching hazardous materials; and removed polluted sediments from the area of its marine railways.

This action was tried to the court between November 3 and December 3, 1998. Both sides presented evidence and expert testimony about conditions at Defendant's facility, and the district court made three visits to the facility.

On March 2, 1999, the district court found in Plaintiffs' favor in an unpublished order. After reaffirming its earlier rulings that Plaintiffs had standing and that the notice letter was adequate, the court concluded (1) that Defendant's SWPPP and monitoring plan, as revised in August 1996, were adequate; but (2) that Defendant had failed to implement those plans adequately, thereby violating its

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[2] Defendant has operated under three storm water permits during the pendency of this litigation. The provisions of those permits that Defendant was found to have violated, and to which we refer in this opinion, have remained essentially consistent in all three permits.

permit and the CWA. The court imposed injunctive relief and a civil penalty of $799,000.

The district court then asked Plaintiffs to prepare proposed findings of fact and conclusions of law. Plaintiffs submitted proposed findings on May 7, 1999, and Defendants filed objections thereto. The district court held hearings on July 13 and August 19, 1999, to consider Defendant's objections. Defendant argued, among other things, that the district court's proposed injunction was too broad and too costly. To address those arguments, the district court asked the parties to submit additional evidence concerning the proposed injunction.

On September 7, 1999, the district court issued its findings of fact and conclusions of law. The court found: (1) that Plaintiffs had presented "convincing evidence" that Defendant had not made the required inspections that it claimed to have made; (2) that, even accepting Defendant's statement that it *had* made the required inspections, Defendant had not maintained adequate *records* of those inspections, with the result that a large number of inspection reports were missing; (3) that the reports that Defendant *had* provided demonstrated a pattern of poor housekeeping at Defendant's facility and showed that violations, when reported, were not always remedied in a timely manner; (4) that Defendant's inadequate implementation of its plans had led to "significant contributions of pollutants to Defendant's leasehold"; (5) that Defendant's leasehold within the Bay was "devoid of life"; (6) that the evidence conclusively demonstrated that substantial quantities of pollutants from Defendant's paint-blasting operations had entered San Diego Bay in Defendant's storm water discharges; (7) that Defendant's failure to implement its storm water plans adequately was contributing to and perpetuating the contamination of its marine leasehold; and (8) that the harm to Defendant's leasehold "could be remedied by Defendant with improved

practices." Based on those findings, the court concluded: (1) that it had subject matter jurisdiction over the action; (2) that Plaintiffs had standing; (3) that Defendant had violated, and was continuing to violate, the relevant permits and plans; and (4) that Defendant's failure to implement its plans adequately was the result of "systemic problems" and "overall inadequacies" in implementation, rather than mere "snapshots" of isolated violations.

The district court's findings of fact and conclusions of law also reiterated the injunctive relief and civil penalties that the court had imposed in its earlier order. In response to Defendant's objections, the court entered a limited stay governing several provisions of the injunction, to allow the parties to submit further studies and evidence. On March 6, 2000, the district court held its final hearing regarding the limited stay. After making minor changes to the injunction, the court lifted the stay in an unpublished order dated March 7, 2000.

In its injunction, the court ordered Defendant (1) to test its storm water discharges for significant pollutants before releasing them into the Bay; (2) to sweep, after every shift, uncontained areas in which operations may have caused deposits of debris and to provide mats and air hoses so that workers could clean their shoes after leaving such areas; (3) to make daily inspections of its facilities (except when the shipyard is not operating) and keep records of those inspections; (4) to test the water column around each vessel that is being blasted or painted to determine if those operations are contributing to pollution in the Bay; (5) to correct conditions that might allow pollutants to enter the Bay, within four hours if feasible; (6) to repair or replace shrouds that are in poor repair; (7) to capture all storm water coming off its piers (the district court allowed Defendant 18 months to comply with this condition); and (8) to erect and maintain concrete berms in areas of the facility from which runoff might enter the Bay. The court rejected

Plaintiffs' argument that Defendant should be required to remediate the contamination of the sediments in its marine leasehold.

This timely appeal followed.

DISCUSSION

Defendant challenges the district court's rulings on (1) standing, (2) the adequacy of Plaintiffs' notice letter, (3) ongoing violations, (4) the terms of the injunction, and (5) the civil penalty. We will address each of those issues in turn.

I. *Standing*

First, Defendant argues that the district court erred in holding that Plaintiffs had standing to bring this action. We review de novo the question whether a party has standing to bring an action. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1152 (9th Cir. 2000).

In order to satisfy Article III's standing requirements in a CWA citizen enforcement action, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely ... that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 120 S. Ct. 693, 704 (2000). An association like NRDC "has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.*

Defendant argues that Plaintiffs cannot satisfy any of the three requirements for Article III standing. We disagree.

First, Plaintiffs showed "injury in fact." The Supreme Court has held that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Id.* at 705 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). Here, members of the plaintiff organizations, and individual plaintiff Kenneth Moser, testified that they have derived recreational and aesthetic benefit from their use of the Bay (including areas of the Bay next to Defendant's shipyard), but that their use has been curtailed because of their concerns about pollution, contaminated fish, and the like. Those averments are sufficient to satisfy the "injury in fact" component of Article III standing.

Second, the injury is "fairly traceable" to the challenged activity. This requirement, more precisely, is that there must be "a causal connection between the injury and the conduct complained of -- the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Plaintiffs presented evidence that the sediments in Defendant's marine leasehold contained elevated concentrations of pollutants, that Defendant had discharged the same pollutants, and that Defendant's marine leasehold was "devoid of life." That evidence was sufficient to demonstrate that Plaintiffs' injury was "fairly traceable" to Defendant's conduct. As the Fourth Circuit has noted, the threshold requirement of "traceability does not mean that plaintiffs must show to a scientific certainty that defendant's effluent ... caused the precise harm suffered by the plaintiffs" in order to establish standing. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149,

161 (4th Cir. 2000) (en banc) (citations and internal quotation marks omitted). To satisfy this requirement, "[r]ather than pinpointing the origins of particular molecules, a plaintiff must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern." *Id.* (citation and internal quotation marks omitted); *see also Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 558 (5th Cir. 1996) (to the same effect); *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 72 (3d Cir. 1990) (same). Plaintiffs made that showing in this case.

Third, Plaintiffs demonstrated that a favorable decision would redress their injuries. A plaintiff who seeks injunctive relief satisfies the requirement of redressability by alleging a continuing violation or the imminence of a future violation of an applicable statute or standard. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108 (1998). Plaintiffs alleged that Defendant was continuing to violate its permits; what is more, as discussed below, they proved continuing violations at trial. Because they sought an injunction to halt those continuing violations, Plaintiffs satisfied the requirement of redressability.

In sum, the district court did not err in holding that Plaintiffs had standing to bring this action.

II. *Notice--Subject Matter Jurisdiction*

Next, Defendant argues that Plaintiffs' notice letter was insufficient. Under the CWA,

> No action may be commenced-
>
> (1) under subsection (a)(1) of this section --
>
> (A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order....

33 U.S.C. § 1365(b). The applicable regulation provides that the notice

> shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.

40 C.F.R. § 135.3(a).

If a party seeking to bring a citizen enforcement action has not complied with the CWA's notice requirement, then the district court in which that action is brought lacks subject matter jurisdiction and must dismiss the action. *Washington Trout v. McCain Foods, Inc.*, 45 F.3d 1351, 1354 (9th Cir. 1995); *see also Hallstrom v. Tillamook County*, 493 U.S. 20, 26 (1989) (requiring strict compliance with notice requirement for citizen enforcement action under the Resource Conservation and Recovery Act). "In practical terms, the notice must be sufficiently specific to inform the alleged violator about what it is doing wrong, so that it will know what corrective actions will avert a lawsuit." *Atlantic States Legal Found., Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 819 (7th Cir. 1907). We review de novo the district court's conclusion that Plaintiffs' notice was adequate. *See Washington Trout*, 45 F.3d at 1353.

The district court treated Plaintiffs' notice letter as alleging two separate, but related, violations concerning the pollution prevention plans required by its permits and the CWA. The first was Defendant's failure to *prepare* adequate plans; the second was Defendant's failure to *implement* adequate plans.

With regard to those issues, Plaintiffs' notice letter clearly satisfies some of the requirements of notice. The

letter was mailed to the appropriate entities. *See* 40 C.F.R. § 135.3(a). It identified the persons giving notice and the persons responsible for the alleged violation. Although the letter did not identify a specific date, or a specific location within Southwest Marine's facility, it nevertheless satisfied those requirements as well. *See id.* Plaintiffs were not alleging that a particular discharge from a particular pipe on a particular day had violated the CWA. Rather, they were alleging that Defendant had failed to prepare and implement plans that were required by its permit. As the district court correctly noted, the failure to develop and implement pollution prevention plans are violations "occurring at the facility in general." *Southwest Marine*, 945 F. Supp. at 1333. Moreover, "the deficiencies in these plans are ongoing, so there is no specific date that can be alleged as the date of the violation." *Id.*

The parties' dispute before us centers on the specificity of the notice letter. *See* 40 C.F.R. 135.3(a) (requiring that a notice letter "include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, [and] the activity alleged to constitute a violation"). The notice letter generally raises the issues of the preparation and implementation of an adequate SWPPP. Our first question is whether the notice letter raised those issues adequately to satisfy the requirements of the CWA.

As to the alleged failure to *prepare* an adequate plan, the notice letter was clearly adequate, and we do not understand Defendant to argue otherwise. The letter charged, among other things, that Defendant had failed to prepare an SWPPP that complied with the specific requirements of Defendant's storm water permit; identified the source of the requirement that Defendant prepare an adequate SWPPP; and explained the ways in which Defendant's then-existing SWPPP did not comply with the storm water permit.

Defendant argues, however, that the notice letter was not sufficient with regard to Plaintiffs' allegation that it failed to *implement* an adequate plan. Specifically, Defendant asserts that the district court lacked jurisdiction to consider Plaintiffs' allegations of "poor housekeeping." The notice letter alleges that Defendant failed to implement an adequate SWPPP, including a "good housekeeping" provision. "Good housekeeping" was required under Defendant's storm water permits. Defendant acknowledges that the court's reference to "poor housekeeping" does "arguably correspond" to Plaintiffs' reference to storm water controls and good housekeeping in Attachment 2 of the notice letter. See Appendix A at Attachment 2, page 1.

Nevertheless, Defendant argues that Plaintiffs failed to refer to, or identify, the "good housekeeping" provision of its revised SWPPP and, thus, failed to provide any information about how Defendant had violated that specific plan provision. The difficulty with that argument is that the notice letter predates the plan provisions to which Defendant refers. Plaintiffs mailed their notice letter in April 1996. The "good housekeeping" provision to which Defendant refers, and which Defendant cites in its brief, is contained in Defendant's *revised* SWPPP, which was filed in August 1996. Although we require strict compliance with the CWA's notice requirement, we do not require citizen-plaintiffs to refer to provisions of plans that do not exist.

We hold that the notice letter was sufficient, on the date it was mailed, to allow the district court to exercise jurisdiction over Plaintiffs' "good housekeeping" claims. Defendant was operating under a storm water permit that was designed to prevent discharges of toxic pollutants through storm water. That permit required Defendant to prepare and implement an SWPPP that included a "good housekeeping" provision. The permit explained that "[g]ood housekeeping requires the maintenance of clean, orderly

facility areas that discharge storm water. Material handling areas shall be inspected and cleaned to reduce the potential for pollutants to enter the storm water conveyance system." Plaintiffs' notice letter sufficiently alleged that Defendant had failed to prepare *and implement* such a plan.

And Defendant obviously understood at least some of the alleged violations. In response to Plaintiffs' letter, Defendant completely revised its SWPPP and SWPMP within four months, adding sections that specifically made reference to the requirements that Plaintiffs had identified. *See Atlantic States*, 116 F.3d at 820 (concluding that notice was sufficiently specific where the defendant, after receiving notice, took immediate steps to cure the problems identified in the notice letter). And, as noted, Defendant made substantial changes to its facility and operations during the pendency of this litigation, concededly in an attempt to remedy some of the inadequacies of which Plaintiffs had complained.

The second and more theoretical question that Defendant's argument raises is what, if any, effect Defendant's post-notice alterations of its plans and facilities had on the adequacy of the notice letter. If a defendant receives a proper notice letter alleging that it has failed to prepare and implement an adequate plan and, in response, prepares a new plan and begins to implement it before the complaint is filed, is the otherwise proper notice letter defective for failing to identify and discuss the new plan and its implementation? In those circumstances, must a citizen-plaintiff send a new notice letter? We think not. Subject matter jurisdiction is established by providing a notice that is adequate on the date it is given to the defendant. The defendant's later changes to its operations and plans may affect standing, *see Steel Co.*, 523 U.S. at 105-06; the question of ongoing violations or remedies, *see Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987); or mootness, *see Laidlaw*, 120 S.

Ct. at 708.[3] But such changes do not retroactively divest a district court of jurisdiction under 33 U.S. C. § 1365 (b).

Defendant also cites *Washington Trout* and *Hallstrom* in support of its argument that notice was inadequate. Those cases are distinguishable from this one. In *Washington Trout* and *Hallstrom*, the plaintiffs had failed to comply with the facial requirements for notice set out in the applicable statutes and regulations.

In *Washington Trout*, the plaintiffs mailed the defendant a letter alleging improper discharges of pollutants; however, "the letter did not provide the address and phone number of the named plaintiff, nor did it furnish the identity, address, and phone number of [the other plaintiffs]." 45 F.3d at 1352. Further, "the notice failed to specifically identify the dates" of the allegedly unlawful discharges. *Id.* This court held that those failures to comply with 40 C.F.R. § 135.3(a) precluded the district court from assuming jurisdiction over any part of the plaintiffs' action. *Id.* at 1354-55.

In *Hallstrom*, the plaintiffs filed a citizen enforcement action under the Resource Conservation and Recovery Act, which contains a notice provision that is substantively identical to the CWA's notice provision. *See* 42 U.S.C. § 6972(b). The Supreme Court held that the district court lacked subject matter jurisdiction over the plaintiffs' action because the plaintiffs had failed to give any notice to the EPA or to the appropriate state agency as § 6972(b) requires. *See Hallstrom*, 493 U.S. at 33.

Those cases establish that the CWA's notice requirement is strictly construed and that compliance with

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[3] Using Defendant's corrective actions as evidence of its understanding of Plaintiffs' letter might seem to suggest a strategy of avoiding remedial measures so as not to create unfavorable evidence. Such corrective actions, however, would benefit a defendant on issues of standing, mootness, and remedy, as illustrated by the cases cited in the text.

the notice requirement is a prerequisite to a citizen enforcement action. But this case presents a different problem. Unlike in *Washington Trout* and *Hallstrom*, the question in this case is not whether the district court had subject matter jurisdiction over *any part* of Plaintiffs' action; Defendant does not contest that the notice was adequate as to the allegation that it had failed to *prepare* an adequate SWPPP. Rather, the question is whether the district court exercised jurisdiction over *particular issues* that were not raised in the notice letter and, thus, were beyond the scope of the court's jurisdiction.

We have resolved that question in Plaintiffs' favor. As discussed above, we hold that Plaintiffs, letter gave Defendant adequate notice of all the claims over which the district court exercised jurisdiction. Accordingly, the district court did not err in concluding that Plaintiffs' notice letter satisfied the requirements of 33 U.S.C. § 1365(b).

III. *Evidence of Ongoing Violations*

Next, Defendant argues that the district court erred in concluding that it had committed "ongoing violations" of requirements in its storm water permit. We review findings of fact for clear error and conclusions of law de novo. *Russian River Watershed Prot. Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1140 (9th Cir. 1998). We review de novo a district court's interpretation of an NPDES permit when its terms are unambiguous. *Id.* at 1141.

The CWA "does not permit citizen suits for wholly past violations"; rather, the statute "confers jurisdiction over citizen suits when the citizen-plaintiffs make a good-faith allegation of continuous or intermittent violation." *Gwaltney*, 484 U.S. at 64. Here, the district court properly concluded that Plaintiffs had made such good-faith allegations and thereby had satisfied *Gwaltney's* threshold requirement for jurisdiction.

To prevail at trial, a citizen-plaintiff must prove that ongoing violations actually have occurred. "[A] citizen plaintiff may prove ongoing violations 'either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations.' " *Sierra Club v. Union Oil Co.*, 853 F.2d 667, 671 (9th Cir. 1988) (quoting *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171-72 (4th Cir. 1988)). This court also has adopted the Fourth, Circuit's conclusion that "'[i]ntermittent or sporadic violations do not cease to be ongoing until the date when there is *no real likelihood of repetition.*' [*Chesapeake Bay Found.*, 844 F.2d] at 172 (emphasis added)." *Id.*

Defendant groups three arguments under this heading. First, Defendant argues that the district court erred in holding that it had violated any condition of its storm water permit. We disagree. As noted, the district court found that Defendant had failed to make -- or had failed to keep records of -- numerous daily inspections of its facility. Those daily inspections -- and records of the inspections -- were required by Defendant's 1992 and 1996 SWPPPs. The SWPPPs, in turn, were required by Defendant's storm water permit, which contemplated that Defendant would inspect its facility and keep records of its inspections. The district court also found that the inspection reports that Defendant did produce revealed "a pattern of poor housekeeping." Defendant's own inspection reports showed that the "good housekeeping" standard was not met uniformly and that violations were not always remedied quickly.

Moreover, the district court found that Defendant's failure adequately to implement its SWPPP "led to significant contributions of pollutants" to the Bay from Defendant's discharges. The court further found that those

discharges contributed to the contamination of Defendant's marine leasehold and that the leasehold is "devoid of life." Those findings are supported by evidence and, accordingly, are not clearly erroneous. Each of Defendant's successive storm water permits has specifically prohibited discharges that cause adverse effects on the environment. For example, Defendant's current storm water permit prohibits discharges that degrade marine communities, cause adverse effects on the environment, or result in harmful concentrations of pollutants in marine sediments. Because the district court found that Defendant's failure to implement its storm water plans led to discharges that violated those standards, the court's conclusion that Defendant violated its storm water permit was not error.

Second, Defendant argues, "[e]lven assuming *arguendo* that Southwest Marine did not, at some point in time, implement its stormwater plans adequately, it was legal error for the district court to find an *ongoing* violation of that permit requirement." (Emphasis in original.) As a threshold matter, we reject Defendant's argument that we review this question for legal error. The district court's conclusion that Defendant's violations were ongoing was a finding of fact, which we must affirm unless clearly erroneous. *See Union Oil*, 853 F.2d at 671 (stating that a plaintiff could prove a continuing violation "by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations").

Here, the district court found that Defendant had failed to implement its plans adequately even after Plaintiffs filed their complaint. As the district court noted, there is evidence of incidents of poor housekeeping during the pendency of this action. Defendant argues that the district court's finding of an ongoing violation "improperly combines several discrete and unrelated workplace incidents." But the district court found that the ongoing violations

"present[ed] a picture of overall inadequacies," not mere "snapshots." Notwithstanding Defendant's argument, we may not disturb that finding if it is supported by evidence. And it is; the evidence on which the district court relied was sufficient to permit a reasonable trier of fact to find "a continuing likelihood of a recurrence in intermittent or sporadic violations." *Union Oil*, 853 F.2d at 671. Accordingly, the district court's finding of a continuing violation was not clearly erroneous.

Third, Defendant argues that, even if there is sufficient evidence in the record to establish an ongoing violation of the permit, we should nevertheless remand for the district court to explain further the factual and legal basis for its decision. Because we conclude that the district court has provided sufficient factual and legal support for its decision, we do not agree that remand is necessary or appropriate.

IV. *The Injunction*

Next, Defendant argues that the injunction was improper. District courts have "broad latitude in fashioning equitable relief when necessary to remedy an established wrong." *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 986 (9th Cir.1994). We review a district court's decision to issue an injunction under the CWA, and its determination of the scope of that injunction, for abuse of discretion. *See Natural Res. Def. Council, Inc. v. Texaco Ref. & Mktg., Inc.*, 906 F.2d 934, 937 (3d Cir. 1990) (so holding); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) (describing decision to award or deny injunction as an exercise of a district court's equitable discretion).

Defendant contends that the district court abused its discretion by imposing requirements that are not contained in Defendant's permits or plans. By so doing, Defendant argues, the district court essentially overrode the existing permits. According to Defendant, that was improper for two reasons: (1) it was an abuse of discretion, and (2) it

violated principles of separation of powers by usurping the authority of the executive-branch agencies that issued the permits. Because those arguments both turn on the underlying question whether the district court overrode Defendant's existing permits, we address the arguments together.

Defendant is correct that a district court's equitable powers under the CWA are limited to enforcing standards, limitations, and orders that have been violated. 33 U.S.C. § 1365(a). That enforcement authority does not allow equitable measures that are wholly unrelated to a violation of an existing standard, limitation, or order. Nor may a district court exercise its general equitable authority to override the terms of a properly issued permit. *See City of Milwaukee v. States of Illinois & Michigan*, 451 U.S. 304, 320 (1981) ("Federal courts lack authority to impose more stringent effluent limitations under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme.").

But here the district court permissibly found violations of extant permits. The key question is what a district court may do, pursuant to its equitable powers, in aid of enforcing standards, limitations, and orders that have been violated.

According to Defendant, a court may do little more than tell the violator to comply with the applicable requirements. Thus, Defendant says, the district court in this case should have "simply order[ed] Southwest Marine to comply with specifically-identified pollution plan provisions."

We do not agree that a district court's equitable authority is so cramped. The authority to "enforce" an existing requirement is more than the authority to declare that the requirement exists and repeat that it must be followed. So long as the district court's equitable measures are reasonably calculated to "remedy an established wrong,"

they are not an abuse of discretion. *Alaska Ctr.*, 20 F.3d at 986.

We conclude that the injunctive measures satisfy that standard. Those measures all are consistent with, and complementary to, existing permit requirements. The requirement that Defendant's employees sweep open areas where debris may have accumulated (or certify that there was no debris to sweep) and wipe their feet on mats after leaving such areas is a good housekeeping measure designed to remove pollutants from areas where storm water accumulates, as contemplated in Defendant's permits; the requirement that Defendant fix and maintain its shrouds is consistent with the permit requirement for structural BMPs, such as shrouds, that provide overhead coverage; the requirement that Defendant install concrete berms is consistent with the requirement for structural BMPs, such as berms, that channel or route storm water away from sources of pollutants; the requirement that Defendant conduct water-column testing around each vessel that is being blasted or painted is consistent with the permit requirements for storm-water monitoring; the requirement that Defendant make daily inspections and keep records of those inspections is consistent with numerous permit requirements requiring monitoring and recordkeeping (and, further, is almost identical to a provision in Defendant's original BMP plan); the requirement that Defendant correct potentially dangerous conditions within four hours, if feasible, is consistent with permit requirements for prompt response in cases of leaks and spills; and the requirements that Defendant capture storm water coming off piers and test storm water discharges before releasing them into the Bay are consistent with the requirement that Defendant not discharge storm water that adversely affects the environment or degrades marine communities on Defendant's leasehold, which the district court found had

been rendered devoid of life by (among other things) Defendant's discharges.

The injunctive measures are consistent with the terms of Defendant's storm water permits and seek to enforce the requirements of those permits and the relevant plans. They are not identical to the requirements of the plans and permits, but complement those requirements. In imposing those injunctive measures, the district court did not override agency determinations or supersede existing permit requirements. Rather, it properly exercised its equitable authority to enforce existing requirements with which Defendant had failed to comply.

Our conclusion that those provisions of the injunction were consistent with Defendant's storm water permit also disposes of Defendant's separation-of-powers argument. Because the district court merely enforced the permits, it did not "usurp" the authority of the executive branch.

Defendant also argues that the district court failed to balance the equities or make the necessary findings before issuing its injunction. We are unpersuaded. The district court considered Defendant's testimony concerning the cost and difficulty of the various injunctive measures. The district court also heard testimony throughout the trial about the extreme degree of environmental degradation in the Bay in general, and on Defendant's leasehold in particular. The court temporarily stayed the injunction to allow further argument and evidence, and eventually modified the original injunction with respect to testing, containment of runoff, and cleanup. Finally, in its order lifting the temporary stay, the court noted that it was mindful of the cost that it was imposing on Defendant, but concluded that the cost was outweighed by the need for swift corrective action and the fragility of the local marine environment. The district court's findings and balancing of the equities were adequate to justify its injunction.

In sum, we conclude that the district court's injunction was not an abuse of discretion. We also conclude that the injunction did not violate the separation-of-powers doctrine. Therefore, we affirm the injunction in its entirety.

V. *Civil Penalties*

Finally, Defendant argues that the district court abused its discretion in imposing a civil penalty of $799,000, because the penalty is excessive, unreasonable, and unsupported by evidence. We review for abuse of discretion the amount of a civil penalty under the CWA. *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1397 (9th Cir. 1995).

The district court imposed the penalty pursuant to 33 U.S.C. § 1319(d), which provides, as relevant: "Any person who violates ... any permit condition or limitation ... shall be subject to a civil penalty not to exceed $25,000 per day for each violation." If a district court finds a violation, then civil penalties under 33 U.S.C. § 1319(d) are mandatory. *Leslie Salt*, 55 F.3d at 1397. A district court has discretion to set the amount of a penalty (up to the statutory maximum) and is instructed to consider the seriousness of the violation, any economic benefit that resulted from the violation, any history of violations by the party to be penalized, that party's good-faith efforts to comply with the applicable requirements, the economic effect of the penalty on the violator, and "such other matters as justice may require." 33 U.S.C. § 1319(d).

The district court found that Defendant had been in violation of the CWA for 799 days when the trial began and, after considering the statutory factors, imposed a penalty of $1,000 for each of the 799 days of violation. However, the court also ordered that the penalty will be reduced by the amount of the cost of any actions that Defendant takes to improve its storm water diversion system and any changes that Defendant makes to its facilities to comply with the court's injunction.

Thus, the amount of the penalty actually is *$799,000 minus the cost of such physical alterations.* In challenging the injunction, Defendant presented evidence that *one* such alteration – the installation of a storm-water diversion system – would cost more than $1 million *by itself.* Accordingly, anticipated alterations, when offset against the $799,000 civil penalty, will reduce the penalty to zero. In the circumstances, we cannot agree that the penalty is excessive, and we hold that the district court did not abuse its discretion.

CONCLUSION

For the reasons stated, we AFFIRM the district court's judgment in favor of Plaintiffs, the injunction, and the civil penalty.

APPENDIX

April 30, 1996

Certified Mail – Return Receipt Requested

Art Engle
President Southwest Marine, Inc.
P.O. Box 13308
San Diego, California
92170-3308

Lawrence Killeen
Executive Director
San Diego Unified Port District
P.O. Box 488
San Diego, California
92112

Re: Notice of Intent to Sue for Violations of the Clean Water Act

Dear Messrs. Engle and Killeen:

We write to notify you that the San Diego BayKeeper and the Natural Resources Defense Council ("NRDC") believe that Southwest Marine, Inc. and the San Diego Unified Port District ("Port District") are violating the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 ("Clean Water Act" or "Act"), as described below.

The information currently available to us indicates that Southwest Marine and the Port District have violated and continue to violate requirements concerning discharges from the Southwest Marine facility at the foot of Sampson Street in the City of San Diego. These requirements, including requirements related to discharges associated

with or ancillary to industrial manufacturing and treatment, are embodied in the Act, its implementing regulations, and National Pollutant Discharge implementing regulations, and National Pollutant Discharge Elimination System ("NPDES") Permit No. CA0107697. This permit was issued pursuant to the Act by the California Regional Water Quality Control Board, San Diego Region ("Regional Board") on or around April 18, 1983. The requirements with which we believe Southwest Marine and the Port District have failed to comply are set forth in Attachment 1 to this letter. See also 33 U.S.C. §§ 1311(a), 1314(e), & 1365, 40 C.F.R. Subpart K.

Additionally, the information currently available to us indicates that Southwest Marine and the Port District have violated and continue to violate NPDES General Permit No. CAS000001 governing stormwater discharges associated with industrial activities in California ("General Industrial Permit"). The General Industrial Permit"). The General Industrial Permit was issued pursuant to the Act by the California State Water Resources Control Board ("State Board") on or around November 19, 1991, and amended by the State Board on or around September 17, 1992. Coverage under and compliance with the General Industrial Permit are required before Southwest Marine can lawfully discharge stormwater associated with industrial activity. The General Industrial Permit requirements with which we believe Southwest Marine and the Port District have failed to comply are set forth in Attachment 2 to this letter. See also 33 U.S.C. §§ 1311(a), 1342(p), & 1365, 40 C.F.R. § 122.26.

The San Diego BayKeeper and NRDC hereby notify you of their intent to sue Southwest Marine and the Port District for their failure to comply with requirements embodied in the Clean Water Act, the Act's implementing regulations, NPDES Permit No. CA0107697, and the

General Industrial Permit. With this letter, the undersigned give notice of the alleged violations to the following parties: Art Engle as owner and/or managing agent of Southwest Marine; Lloyd A. Schwartz as registered agent in California of Southwest Marine; Lawrence Killeen as the head of the Port District; the Administrator of the United States Environmental Protection Agency ("EPA"); the Regional Administrator of EPA; the Executive Officer of the State Board; and the Acting Executive Officer of the Regional Board.

We believe that this notice of intent to sue sufficiently states the grounds for complaint. This notice covers all violations through the present. A suit, when filed, will also address any violations that occur after service of this notice letter. The San Diego BayKeeper and NRDC intend to sue on behalf of their organizations and their respective members.

The San Diego BayKeeper and NRDC pursue negotiation whenever possible. This negotiation policy applies to all types of environmental disputes, including enforcement of stormwater pollution prevention requirements. In keeping with this policy, we invite you to discuss your Clean Water Act compliance with us.

If you have any question about the issues raised in this letter or if you believe any of our allegations are incorrect, please contact us by telephone, telecopy or mail. We can be reached at the offices of the San Diego BayKeeper, listed on the first page of this letter. NRDC's office location is as follows: 6310 San Vicente Blvd., Suite 250, Los Angeles, California 90048, (213) 934-6900 (voice), (213) 934-1210 (facsimile). If you wish to contact us before we file a complaint, we request that you do so as quickly as possible. We intend to file suit 60 days after the date of this letter. See 33 U.S.C. § 1365(b)(1)(a).

Sincerely,

/s/ Everett L. DeLano, III

Everett L. DeLano, III
Senior Project Attorney
San Diego BayKeeper/
Natural Resources Defense
Council

/s/ Ken Moser

Ken Moser
Executive Director
San Diego BayKeeper

Enclosures

cc: Carol Browner
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San Diego, CA 92124-1331

Lloyd A. Schwartz
Registered Agent
Southwest Marine
P.O. Box 13308
San Diego, California
92170-3308

Attachment 1

The information currently available to the San Diego BayKeeper and NRDC indicates that Southwest Marine and the Port District have violated the Act, its implementing regulations, and NPDES Permit No. CA0107697. These violations include, but are not limited to, the following:

1) NPDES Permit No. CA0107697 Parts B.3 (p. 7) & D.7 (p. 10) and 40 C.F.R. § 125.104(b), requiring the development and implementation of best management practices programs, including, but not limited to:

- establishing specific objectives for control of toxic and hazardous pollutants by predicting direction, rate of flow and total quantity of pollutants; and,

- addressing the following points for ancillary activities: material inventory; material compatibility; reporting and notification procedures; visual inspections; preventive maintenance; and, security.

2) NPDES Permit No. CA0107697 Part C.5 (p. 8), prohibiting concentrations of toxic substances in waters that produce detrimental physiological responses in human, plant, animal, or aquatic life.

3) NPDES Permit No. CA0107697 Part E.10 (p. 14) and 40 C.F.R. § 125.104(c)(1), requiring the submittal of a complete permit application.

Attachment 2

The information currently available to the San Diego BayKeeper and NRDC indicates that Southwest Marine and the Port District have violated the General Industrial Permit. These violations include, but are not limited to, the following:

1) Parts B.1 & B.2 (p. 3)[1], prohibiting stormwater discharges that adversely impact human health or the environment, and prohibiting stormwater discharges that cause or contribute to a violation of any applicable water quality standards, respectively.

2) Part C.2 (p. 3) and Section A (pp. 5-7), requiring the development and implementation of a Stormwater Pollution Prevention Plan, including, but not limited to:

- listing pollutants likely to be present in stormwater in significant quantities and estimating the annual quantities of these pollutants, Section A.4.d; and,

- describing the stormwater management controls appropriate for the facility (for example, stormwater pollution prevention personnel, preventive maintenance, good housekeeping, spill prevention and response, stormwater management practices, erosion and sediment controls, employee training, and inspections), Section A.5.

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1 Part, Section, and Page references are to the General Industrial Permit.

3) Part C.3 (p. 3) and Section B (pp. 9-16), requiring the development and implementation of a monitoring and reporting plan, including, but not limited to:

- conducting an annual site inspection, Section B.5.a;

- conducting visual observations of all stormwater discharge locations during the first hour of one storm event per month that produces significant stormwater discharge, Section B.5.c;

- collecting and analyzing samples of stormwater discharge from at least two storm events, Section B.5.d;

- analyzing samples of stormwater discharge for toxic chemicals and other pollutants that are likely to be present in stormwater discharge in significant quantities, Section B.5.d.ii;

collecting samples from all locations where stormwater is discharged or, in the alternative, adequately establishing and documenting that stormwater discharges from different locations are substantially identical, Section B.11;

notifying the Regional Board, and, if applicable, appropriate local agency, of instances of non-compliance with General Industrial Permit requirements, Section B.17.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 96-CV-1492-B AJB

Natural Resources Defense Council,
San Diego BayKeeper, Kenneth J. Moser,
Plaintiffs,

v.

Southwest Marine, Inc.,
Defendant.

ORDER: (1) LIFTING LIMITED STAY OF ENFORCEMENT OF JUDGEMENT; (2) DENYING ANY FURTHER STAY PENDING APPEAL; AND (3) SETTING HEARING ON PLAINTIFF'S MOTION FOR ATTORNEY'S FEES

FILED: March 7, 2000

I. Order Lifting Limited Stay Of Enforcement Of Judgment

This Court entered judgment on the above-mentioned case on September 7, 1999 pursuant to Findings of Fact and Conclusions of Law. Upon motion of Defendant, this Court also entered a Limited Stay of Enforcement of Judgment on September 7, 1999, by the terms of which this Court stayed for a period of 90 days the execution of certain portions of its judgment in order to permit the parties to submit

alternative or the most feasible methods to accomplish the corrective action.

Good cause appearing, after review of the parties' papers with respect to Defendant's Motion for Further Stay of Enforcement of Judgment, after hearing oral argument, and after being fully advised, this Court now lifts the previously imposed Limited Stay of Enforcement of Judgment.

With respect to Paragraph 42 of the Findings of Fact and Conclusions of Law, if Southwest Marine shall discharge runoff into the bay because of an inability of its present landslide containment system to handle the runoff, Defendant shall sample the initial discharge from each point of discharge and shall perform chemical analysis and toxicity testing immediately thereafter and shall record these results for future reference. Defendant only need test the initial discharge, if any, from each rain event. A rain event is considered to be rain that is immediately preceded by six hours of dry weather.

With respect to Paragraph 43 of the Findings of Fact and Conclusions of Law ("Sweepdowns"), the Court clarifies the requirement that Defendant shall furnish a sufficient number of mats in addition to its air hose brushing and clean up so that workers exiting the ship area shall wipe their shoes to remove contaminants.

With respect to Paragraph 45 of the Findings of Fact and Conclusions of Law ("Water Column Testing"), the "surface layer" shall be defined to be "microlayer." "Surface layer testing" shall consist of the testing of the "microlayer" and shall be within the top fifty micrometers. The remainder of the water column testing requirement shall remain unchanged.

With respect to Paragraph 48 of the Findings of Fact and Conclusions of Law concerning the capture of storm water coming off of any and all piers, Defendant shall have 18 months from the date of the filing of this order to comply

with this judgment. Defendant shall build its Pier Stormwater Diversion Facility with respect to a five-year storm criteria.

II. Order Denying Any Further Stay Of Enforcement Of Judgment Pending Appeal

Any further stay of enforcement of judgment pending the appeal of this Court's judgment is DENIED.

In making this determination, the Court is mindful of the cost imposed on Defendant with respect to its September 7, 1999 Judgment. The Court is also mindful of the countervailing need for swift corrective environmental action, the fragility of the bay's marine eco-system, and the almost certain inevitability of necessary corrective action on the part of Southwest Marine.

III. Order Setting Hearing On Plaintiffs' Motion For Attorney's Fees

With respect to Plaintiffs' Motion for Attorney's Fees, Plaintiffs' reply brief is due on May 2, 2000 and Defendant's supplemental reply is due on May 9, 2000. Defendant's supplemental reply shall be no longer than 10 pages. Thereafter the Motion for Attorney's Fees will be considered submitted, with hearing to be held on May 23, 2000 at 9 a.m. in Courtroom 2.

Parties are encouraged to stipulate to a reasonable fee award for Plaintiffs' fees in order to obviate the need for hearing. If parties are unable to stipulate to a reasonable fee award thereby necessitating this Court to determine a reasonable fee award, this Court will award attorney's fees for the hearing to that party which comes the closest to the fees awarded by the Court. That amount will be either added to or subtracted from the attorney's fees awarded at the hearing.

IT IS SO ORDERED.

Dated [3-7-00]

/s/ Rudi M. Brewster
UNITED STATES SENIOR
DISTRICT JUDGE

cc: All Parties
Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 96-1492-B AJB

Natural Resources Defense Council,
San Diego BayKeeper, Kenneth J. Moser,
Plaintiffs,

v.

Southwest Marine, Inc.,
Defendant.

LIMITED STAY OF ENFORCEMENT OF JUDGMENT

FILED: September 7, 2000

The Court has on this day entered Judgment in this case, pursuant to Findings of Fact and Conclusions of Law. Enforcement of the Judgment shall be and is hereby stayed as to the following provisions of the Findings of Fact and Conclusions of Law only:

Paragraph 48. Enforcement of only the following portion of paragraph 48 is stayed pending completion of the process set forth below:

Defendant shall have sixty days to prepare engineering alternatives, with supporting cost data, to implement the Court's requirement that SWM "shall capture all stormwater coming off any and all piers." Defendant shall present these alternatives, along with the underlying data,

to Plaintiffs after the sixty-day period. Plaintiffs shall have thirty days to respond as desired to the alternatives. Defendant shall have ten days to reply. This enforcement proposal shall then be considered submitted for further action by the Court. The Court shall select the option it considers to meet its requirement in the most reasonable manner.

SWM's failure to prepare and submit an alternative program to the Court within the stated period shall be deemed a decision not to do so, and Paragraph 48 shall thereafter remain in full force and effect as written.

Paragraph 43. Enforcement of only the following portion of Paragraph 43 is stayed pending completion of the process set forth below:

Because the Court's requirement to "conduct sweep downs after every shift of areas in which operations may have caused deposit of debris" may be unreasonable, the Court notes that it has modified its sweepdown requirement. As modified, the requirement applies only to non-contained areas of the shipyard. However, the Court orders Defendant to evaluate whether workers upon exiting a contained area with accumulations of blast material are "tracking" this blast material into non-contained areas which, in turn, may be entering San Diego Bay. Defendant shall evaluate the feasibility of a "sanitation station," i.e., a location where workers could remove debris from their boots and/or clothes which otherwise might be deposited in non-contained areas. Defendant's proposal for this process shall be filed and served within thirty days. Plaintiffs will have ten days in which to respond to this material, after which Defendant will have ten days to reply. The Court shall select its remedy promptly thereafter.

SWM's failure to submit this finding and/or study to the Court within the stated period shall be deemed a decision not to do so.

Paragraph 45. Enforcement of only the following portion of paragraph 45 is stayed pending completion of the process set forth below:

Defendant shall evaluate the benefits and cost effectiveness of substituting "microlayer" testing such as that set forth in the Kocan Declaration submitted with Plaintiffs' Status Report, i.e., providing that "surface samples" be sea-surface micro layer samples, the top 50 micrometers (um) of water, in place of or as part of the Court's requirement that SWM perform water column testing as described in paragraph 45 of the Findings of Fact and Conclusions of Law. Defendant shall have thirty days in which to conduct this evaluation, after which its findings shall be presented to Plaintiffs. Plaintiffs will have thirty days in which to review this material. Plaintiffs' comments shall be presented to Defendant, who will have ten days to reply. After this time period, this material will be presented to the Court as stated above.

SWM's failure to prepare and submit an alternative program to the Court within the stated period shall be deemed a decision not to do so, and Paragraph 45 shall thereafter remain in full force and effect as written.

Paragraph 42. Enforcement of only the following portion of paragraph 42 is stayed pending completion of the process set forth below:

> ... no release shall be allowed until the results of such testing have been received. No discharge shall be allowed, unless testing results demonstrate that the effluent complies with NPDES permit limits. Southwest Marine shall operate or modify its storm water retention system so as to allow conformance with this requirement throughout its physical facility.

The Court acknowledges that Defendant's existing stormwater containment system exceeds current regulatory

requirements. The Court understands that the proposed test-before-release requirement may require significant capital increases to expand the retention system because of the time delay associated with toxicity testing. This expenditure may be unnecessary in light of the current knowledge of the toxicity and pollution content of Defendant's stormwater over and above the first half-inch of rainfall. The Court also recognizes there are limitations both inherent in (mechanically-fed inflow and gravity outflow) and outside (San Diego City sewer capacity restrictions) of Defendant's physical plant which may require Defendant to retain captured stormwater for a period of time during which a rain event may exceed the holding capacity.

Therefore, in the interim, Defendant shall take the following steps:

a. Early Release

Defendant shall release water from its diversion system to the city sewer system as early as and to the greatest extent possible during a rain event.

b. Release of Excess

Captured rainwater, only to the extent that it exceeds the current capacity of the diversion system and the ability to early release water to the city sewer system, may be released to the Bay even though test results have not been received and despite test results which demonstrate pollutants exceeding NPDES permit standards.

c. Testing

First quarter-inch: Should SWM reasonably anticipate a release of stormwater to the Bay because of a rain event that may exceed the diversion system's capacity, SWM shall test the captured rainwater at approximately the first

quarter-inch level. Defendant shall take split samples, providing one sample to Plaintiffs.

Released water: For every release to the Bay, SWM shall take split samples of the water upon initial release and perform toxicity and contaminant testing. Furthermore, this outflow to the Bay shall also be tested at each new quarter-inch of water exiting the diversion system into San Diego Bay. The results of such testing shall be recorded and maintained and provided to the Court and Plaintiffs in summary form at six-month intervals, assuming that a release was allowed in any particular six-month period. Should these test results demonstrate that water above the capacity of the existing retention system is harmful to the Bay, the Court will consider ordering capital improvements at that time.

Correlated Tables: Defendant shall investigate the feasibility of correlating toxicity results to the presence of individual and/or multiple contaminants in water. The results of this investigation shall be filed and served within thirty days. Plaintiff's shall have ten days in which to respond. Defendants shall then have ten days to reply. The Court may thereafter enter such further orders for remedial action as shall appear just and necessary.

The Court has set a status hearing on January 27, 2000 at 2:00 p.m., at which time the Court expects to lift this Stay of Enforcement and issue such modifications as may be just and necessary to the ordered injunctive relief. All other provisions of the Findings of Fact and Conclusions of Law and Judgment shall remain in full force and effect as written.

IT IS SO ORDERED.

DATED: [9-1-99]

/s/ Rudi M. Brewster
UNITED STATES SENIOR DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 96-1492-B AJB

Natural Resources Defense Council,
San Diego BayKeeper, Kenneth J. Moser,
Plaintiffs,

v.

Southwest Marine, Inc.,
Defendant.

JUDGMENT FOR MONETARY DAMAGES AND INJUNCTIVE RELIEF

FILED: September 7, 1999

This case having come to trial on November 3, 1998, before the Honorable Rudi M. Brewster, United States Senior District Judge, presiding without a jury; and,

The court having issued its Decision in Plaintiff's favor on March 3, 1999; and

The court having issued Findings of Fact and Conclusions of Law on [9-1], 1999,

NOW, THEREFORE, it is hereby **ORDERED** that, for good cause shown, Judgment is hereby entered in favor of plaintiffs Natural Resources Defense Council, San Diego BayKeeper and Kenneth J. Moser and against defendant

Southwest Marine, Inc., as provided for in the Findings of Fact and Conclusions of Law.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction over this matter for the next three (3) years ending March 3, 2002, and that Plaintiffs may petition this Court, upon a showing of good cause, to extend this Court's jurisdiction fo an additional reasonable time sufficient to ensure that Defendant is complying with the requirements of the Clean Water Act and the terms of this Judgment as set forth in the Findings of Fact and Conclusions of Law.

IT IS FURTHER ORDERED that plaintiffs, as the prevailing party, shall recover their attorneys' fees, experts' fees, related non-taxable expenses and taxable costs from defendant in an amount to be determined by the Court. Plaintiffs shall serve and file their motion for attorneys' fees and costs no later than thirty (30) days following the entry of judgment.

IT IS SO ORDERED.

Dated: [9-1-99] /s/ Rudi M. Brewster
United States Senior District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 96CV1492-B AJB

Natural Resources Defense Council,
San Diego BayKeeper, Kenneth J. Moser,
Plaintiffs,

v.

Southwest Marine, Inc.,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FILED: September 7, 1999

I. INTRODUCTION

This matter came on regularly for trial on November 3, 1998, before the Honorable Rudi M. Brewster, United States Senior District Judge, presiding without a jury. Charles Stevens Crandall, Everett L. DeLano III and Scott H. Peters appeared as counsel for plaintiffs. Steven McDonald, E. Patrick Swan and Lloyd Schwartz appeared as counsel for defendant. Pursuant to F.R.Civ.P. 16 and Civil Local Rule 16.1(f)(10)(b), the Court makes the following findings and fact and conclusions of law:

1. This is an action for injunctive relief, civil Penalties, and declaratory relief by Plaintiffs Natural Resources Defense Council ("NRDC"), San Diego BayKeeper

("BayKeeper"), and Kenneth J. Moser against Southwest Marine, Inc. ("SWM" or "Defendant") for violations of the Federal Clean Water Act ("CWA"), the implementing regulations, and permits issued to SWM by the State of California pursuant to the CWA.

II. STANDING

2. Plaintiff Kenneth J. Moser recreates on San Diego Bay ("the Bay"). Up to and including the time of trial, he lived near the Bay and worked on its waterftont as the Executive Director of San Diego BayKeeper. Mr. Moser resigned as Executive Director of BayKeeper effective January 1, 1999, but he still resides in San Diego, he is still employed by BayKeeper, and remains a member of that organization and Plaintiff NRDC. Plaintiff Moser regularly uses San Diego Bay in a variety of ways. He has aesthetic, health, recreational, scientific and economic interests in San Diego Bay, including the areas within and immediately adjacent to SWM's leasehold.

3. Other members of NRDC and BayKeeper live on or near the Bay. At least one of BayKeeper's members can see the SWM facility from his home. Some of these members volunteer time toward efforts to protect the Bay from pollution and some of them participate in public associations and task forces dedicated to planning future uses of the Bay. Members of NRDC and BayKeeper regularly use the Bay in at least the following ways: boating, sailing, kayaking, wading, sightseeing, fishing, scuba diving, shell fish gathering, swimming, and walking. These members have aesthetic, health, recreational, scientific and economic interests in San Diego Bay, including the areas within and immediately adjacent to SWM's leasehold.

4. Each of the Plaintiffs Moser, NRDC and BayKeeper has suffered, and will continue to suffer, actual

and threatened harms to their interests as a result of SWM's ongoing conduct.

5. The injuries proven by the Plaintiffs are redressible by the orders made by the Court.

III. JURISDICTION AND VENUE

6. The Court has personal jurisdiction over the parties pursuant to 28 U.S.C. § 1331.

7. The Court has subject matter jurisdiction to 33 U.S.C. § 1365(a), which states that district courts have jurisdiction to enforce alleged violations of effluent standards, limitations, or orders.

8. Venue is proper in this Court pursuant to 33 U.S.C. § 1365(c) since the source in question is located in the City and County of San Diego.

9. By a letter dated April 30, 1996 (the "Notice Letter"), Trial Exhibit 12, Plaintiffs gave notice to SWM that it was in violation of its NPDES Permit, the General Industrial Permit, the CWA and their implementing regulations.

10. The Notice Letter adequately apprised Defendant that Plaintiffs were going to sue defendant because SWM had not properly developed and adequately implemented a Storm Water Pollution Prevention System ("SWPPP"), a Best Management Practices ("BMP"), or Stormwater Pollution Prevention and Monitoring Program ("SWPPMP"). Natural Resources Defense Council V. Southwest Marine, 945 F.Supp. 1330, 1333 (S.D. Cal. 1996).

IV. ADMITTED FACTS

11. The following facts were agreed to by the parties and required no proof:

12. Defendant operates a shipyard at the foot of Sampson Street in the City of San Diego. Its principal business is the repair of marine vessels, mostly for the United States Navy.

13. Defendant engages in numerous industrial activities and the facility includes marine railways, dry docks, piers and wharfs, a painting area, a reclamation yard, a sandblast area and assembly and work areas. Industrial activities at the facility include, but are not limited to, abrasive blasting, hydro blasting, paint application, tank cleaning, mechanical repair and maintenance, structural repair and assembly, strength. testing, equipment cleaning, engine repair and installation, hydraulic repair and installation, tank emptying, fueling, pattern making, boiler cleaning, carpentry, refurbishing and modernization, air conditioning and refrigeration repair, sheet metal fabrication, and fiberglass repair.

14. From time to time the following materials have been used at Defendant's facility: abrasive blast grit, anticorrosive paints, antifouling paints, oils, lubricants, greases, fuels, weld, detergents, cleaners, rust inhibitors, paint thinners, and solvents, hydrocarbons or chlorinated solvents, degreasers, acids, caustics, resins, adhesives, cements, sealants, zinc, and chlorine. .

15. SWM's first National Pollutant Discharge Elimination ("NPDES") permit was issued by the Regional Water Quality Control Board, San Diego Region ("RWQCB') on April 18,1983, RWQCB Order No. 83-11 (the "1983 NPDES Permit"). The Regional Water Quality Control Board and the State Water Resources Control Board enforce that permit.

16. On November 19, 1991, the State Water Resources Control Board ("SWRCB') issued a general permit applicable to storm water discharges from industrial facilities in California, SWRCB Order No. 91-13-DWQ (as amended by Order No. 92-12-DWQ)(the "1991 General Industrial Permit"). On or before October 1, 1992, SWM filed a Notice of Intent with the SWRCB to be permitted under the 1991 General Industrial Permit.

17. The 1991 General Industrial Permit requires facilities, including SWM, to implement a Storm Water Pollution Prevention Plan ("SWPPP"), to reduce or eliminate industrial storm water pollution.

18. On August 23,1996, SWM amended its SWPPP.

19. On August 27, 1996, Plaintiffs filed the Complaint herein.

20. On March 31, 1997, the SWRCB issued a new general permit applicable to the discharge of storm water from industrial facilities in California, SWRCB Order No. 97-03-DWQ, (the "1997 General Industrial Permit") and this new permit replaced the 1991 General Industrial Permit.

21. On October 15,1997, the RWQCB issued a new NPDES permit (the "1997 NPDES Permit") that replaced both the 1983 NPDES Permit and the 1997 General Industrial Permit.

22. On March 27, 1998, the Superior Court for the County of San Diego stayed the effectiveness of the 1997 NPDES Permit but that stay was lifted as of the completion of trial.

23. SWM's 1983 NPDES Permit requires the development and implementation of a Best Management Practices Program ("BMP Program").

24. The Clean Water Act and the General Industrial Permit require certain technologies to reduce and eliminate storm water pollution from Defendant's facility and require, among other things, the development of a SWPPP, and a monitoring and reporting program, and other specific requirements set forth therein.

25. Defendant adopted a BMP Plan January 15, 1992. This written plan was not changed until the adoption of a BMP Program Manual on January 12, 1998.

V. ADDITIONAL FINDINGS OF FACT

The Court makes the following additional findings of fact:

A. Adequacy of the Stormwater Plans Vis-A-Vis Permit Requirements

26. Despite early deficiencies, Defendant has developed stormwater prevention plans and best management practices ("BMPs") which are adequate under the law, irrespective of which standard of review -- Best Available Technology ("BAT"), Best Conventional Pollutant Control Technology ("BCT") or reduction of runoff to the Maximum Extent Practicable ("MEP") is applied to the question of adequacy. While plaintiffs presented examples of plan inadequacies, Defendant demonstrated that allegations of inadequacies had either been corrected or were covered within existing categories of the permits. This court's visits to the shipyard have revealed demonstrable improvement.

27. Defendant is not the stereotypical environmental "bad actor." The court is convinced that Defendant has made a good faith effort in its attempt to implement environmental protections. That effort may have been less aggressive without the pendency of this lawsuit. However, whatever the effect of this lawsuit, the plans as written are deemed adequate.

B. Plan Implementation

28. Based on evidence presented at trial, SWM's implementation and enforcement of its SWPPPs, BMPs and SWPPMP are inadequate. That inadequacy existed prior to the time of the filing of this action and continues to this day. As such, plaintiffs have demonstrated to the Court "a continuing likelihood of recurrence in intermittent or sporadic violation" of those issues in its notice letter. See Sierra Club v. Union Oil Co., 853 F.2d 667, 671 (9th Cir. 1988).

29. Plaintiffs have presented convincing evidence that Defendant did not make the inspections Defendant claimed to have made. Even if the Court accepted

Defendant's evidence, the failure to maintain those records demonstrates inadequate practices and a lack of sufficient execution of their above-mentioned programs. Defendant provided no satisfactory explanation for why approximately 53% of these inspection reports are missing.

30. For those inspection reports presented to the court, a pattern of inadequate housekeeping is evident. Violations, even when reported, were not always timely remedied. While a substantial portion of these implementation violations may not have a direct effect on environment, these violations likely had some impact. Defendant maintained that the problems cited to the Court are mere "snapshots," and should not be taken for systematic problems. While such an argument has surface attraction, it is ultimately unconvincing. First, except for this court's most recent visit to SWM, Defendant had adequate opportunity to remedy deficiencies prior to the inspecting party's arrival. Second, evidence to some extent is always of the "snapshot" variety. As stated, taken cumulatively, the evidentiary glimpses of Defendant's operations present a picture of overall inadequacies.

C. Causal Harms

31. Plaintiffs demonstrated that the implementation inadequacies have led to significant contributions of pollutants to Defendant's leasehold and, as such, San Diego Bay. While this case presents complications because of the substantial amount of historically-caused contaminated sediments in Defendant's leasehold, this court finds that Defendant's failed to implement adequately its required plans is contributing to and perpetuating the contamination of the offshore leasehold.

32. Trial experts agreed that the offshore leasehold was "devoid of life." The question presented at trial was whether the stormwater coming from Defendant's landside facility had and has causal connection to the environmental

condition of that offshore habitat. While no one accident of faulty implementation can be said to have caused a level of pollution so as to harm marine life, taken cumulatively, the Court finds that the evidence presented demonstrates that Defendant's operations have contributed to the contamination of San Diego Bay.

33. The evidence conclusively demonstrated that contaminants are entering the marine habitat. The testing performed by Defendant revealed that substantial quantities of pollutants -- metals and toxics -- have entered the Bay in Defendant's stormwater discharges and because of blasting operations. Second, the Court is convinced by the evidence presented that, but for new infusions of contaminants by stormwater or faulty operations, the pattern of contaminated sediments would have revealed a decreasing trend in levels of contamination. The Campbell Shipyard Study (Trial Exhibit 127) undercut the testimony of Defendant's expert Barrick. The long-existing presence of paint chips and abrasive grit in the sedimentation in the leasehold may help explain the lack of a decreasing trend, but it is not a conclusive answer. Third, the Court is convinced that the causal harms to the Bay are harms that could be remedied by Defendant with improved practices.

VI. CONCLUSIONS OF LAW

34. Plaintiffs have demonstrated that: (1) they have been and are being subjected to an actual and threatened harm; (2) the harm is fairly traceable to Defendant's complained-of conduct; and, (3) there is a likelihood that the requested relief will assist in redressing the alleged injuries.

35. Each plaintiff is suffering an injury-in-fact caused by the specific violations alleged in the Notice Letter and Complaint, which is redressible in this action. Therefore, each plaintiff has standing to maintain this action.

36. Existing and continuing violations of the Clean Water Act, the implementing regulations, and SWM's permits have occurred at SWM since August 26, 1996.

37. Civil penalties should be imposed against Defendant.

38. Injunctive relief should be provided to Plaintiffs.

39. Subject matter jurisdiction is proper.

40. SWM has been and is violating the Clean Water Act, its regulations and SWM's permits in numerous respects by failing adequately to implement and enforce water pollution prevention controls.

VII. RELIEF

A. Equitable Relief

41. The Clean Water Act vests courts with broad authority to fashion appropriate equitable remedies. See 33 U.S.C. § 1365(a). Based on that broad authority, this court shall retain jurisdiction over this matter for three years from March 3, 1999. Plaintiffs may petition the court to extend this court's jurisdiction. Upon good cause showing, the Court may extend its jurisdiction for a reasonable time sufficient to ensure that Defendant is complying with the requirements of the Act.

B. Specific Directives

42. **Testing**. To the maximum extent possible, Southwest Marine shall allow no discharge of stormwater effluent from any pipe discharging into the Bay until testing has been performed for every significant known and potential pollutant that may result from shipyard operations and may be contained in the effluent. Such testing shall be performed prior to any anticipated release and no release shall be allowed until the results of such testing have been received. No discharge shall be allowed unless testing results demonstrate that the effluent complies with NPDES permit limits. Southwest Marine shall operate or modify its stormwater retention system so as to allow conformance

with this requirement throughout its physical facility. Southwest Marine shall maintain records of such testing, and make copies available for review by this Court and Plaintiffs at Defendant's expense.

43. **Sweep-downs and certifications**. Southwest Marine shall conduct sweep-downs after every shift of non-contained areas in which operations may have caused deposit of debris. After each sweep-down, certification will be made that no debris remains in the area. Alternatively, Southwest Marine shall certify that no debris was created and thus no sweep-down was necessary. All certifications shall clearly identify the certifying employee and shall be made subject to penalty of perjury. Cleanup of contained areas shall be addressed by the Court after further briefing by the parties as set forth in the Court's Stay filed herewith.

44. **Inspections and Recordkeeping**. Southwest Marine shall make daily inspections of its physical plant. Records shall be maintained for each inspection. Conditions causing or having the potential of cause pollutants to enter the Bay shall be noted in detail. No such inspections shall be required for periods in which the shipyard is not conducting operations. Inspection reports shall note such time periods. All daily inspections shall be certified as correct, and each report shall clearly identify the certifying employee and shall be made subject to penalty of perjury.

45. **Water Column Testing**. On one occasion for each vessel -- whether in drydock or at pier side -- on which blasting or painting operations are conducted, Defendant shall perform testing of the surrounding water to determine if such operations are contributing to pollution levels in San Diego Bay. Such testing shall be performed on a day in which blasting or painting operations constitute a majority of the operations conducted during the shift. Should no such day exist, testing shall be done on the day of greatest blasting or painting activity. Defendant shall divide such testing equally between painting and blasting operations.

Within two hours of such blasting or painting activity, Defendant shall perform water column pollution tests in at least four locations surrounding the vessel. Such locations shall be located within 50 to 100 feet distance from the vessel, and at least 200 feet apart from each other. For each location, water shall be sampled at the surface, and at each 20-foot interval between the water surface and the bottom of the Bay. The results of such tests shall be certified in a manner consistent with the provisions of this Decision, and shall be finished on a quarterly basis to the Magistrate Judge, with one copy provided to Plaintiffs.

46. **Correction Action**. Conditions with potential to allow pollutants to enter the Bay shall be corrected within four hours after observation. Southwest Marine shall certify that such corrective action has been made. Should it not be feasible to take corrective action within four hours, Defendant shall take corrective action in an expeditious manner. Defendant shall state in writing the reason why it was not feasible. Feasibility should be narrowly construed and should, with reason, apply only to mechanical or structural problems. All certifications shall note the manner of corrective action and the time period in which such action was taken. All certifications shall clearly identify the certifying employee and shall be made subject to penalty of perjury.

B. **Physical Plant Improvement**

47. **Shrouds**. Southwest Marine shall repair and/or replace shrouds which are in poor repair, defined as in a state that may allow more than *de minimis* quantities of debris from blasting, painting, or other similar operations from entering the Bay. Such repair and/or replacement shall take place within a reasonably expeditious peniod of time. Defendant subsequently shall maintain and/or replace shrouds which do not meet this criterion.

48. **Piers**. Southwest Marine shall capture all stormwater runoff coming off any and all piers. No scuttling of runoff from piers will be allowed. Defendant shall take steps to meet this requirement in a reasonably expeditious manner.

49. **Berms**. Southwest Marine shall erect and maintain concrete berms in all areas of its physical plant from which runoff may enter the Bay. In areas that experience significant pooling of water, and which threaten to cause discharge into the Bay, Defendant shall pump out such areas on an expeditious basis so as not to allow such discharges. Should areas, including piers, be constructed or re-constructed, Defendant instead may rely on sloping and drainage so long as such a drainage system will accommodate flows from even heavy periods of rainfall. Should this alternative be taken, berms need not be constructed. Should this alternative be taken, Defendant shall certify to the court that such a system is as adequate as any berm system.

50. **Contaminated Sediments Cleanup**. Without deciding the question of its jurisdiction to order cleanup of Defendant's contaminated sediments to specific standards, the Court declines to accept Plaintiffs' invitation to issue such an order at this time. As noted, the majority of the pollution existing in the off-shore leasehold is present because of historical practices at the shipyard before Defendant obtained ownership. Defendant has begun the process of remediation on the marine railways. Defendant will soon begin the process of remediating the rest of the leasehold. The cleanup standard to which the rest of the leasehold must comply will be determined after hearings before the State Water Resources Control Board. The court chooses not to interfere in that process, and sees insufficient reason why Plaintiffs should be accorded financial assistance at this time to be involved in that process.

C. **Penalties**

51. Penalty Amount The Clean Water Act mandates civil penalties for the violations found in this lawsuit. See 33 U.S.C. § 1319(d). Such penalties may not exceed $25,000 per day. Id. Orders issued by this Court on November 30, 1999 and January 28, 1999 have concluded that civil penalties are available to the Plaintiffs. While civil penalties are mandatory if the Court finds violations, the amount assessed is wholly within the discretion of the court. See Atlantic States Legal Foundation v. Tyson Foods, Inc., 897 F.2d 1128, 1142 (11th Cir. 1990); Stoddard v. Western Carolina Regional Sewer Authority, 784 F.2d 1200, 1208 (4th Cir. 1986). "In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." 33 U.S.C. § 1319(d).

52. The Court does not believe such factors can be mechanistically applied. Any violation of the Clean Water Act should be regarded as serious. However, Defendant's violations have not been willful in the sense of a specific intent to violate. Moreover, while this Court has concluded that there is a link between the violations and harm to the Bay, the causation is less-than-direct. There has been no showing that any particular valuation has resulted in immediate harm; the effect is apparent when taken on a cumulative basis. Defendant's experts have convinced the Court that the harms caused are not grave ones, at least in the context of the already polluted conditions. Such a conclusion allows the Court to find that Defendant did not act with deliberate indifference to the health of the Bay, Certainly, this is not a case of massive spills and fish-kills. The Court also believes that Defendant has made good-faith efforts to meet the dictates of the Act's requirements, though it has fallen short with regard to implementation.

However, failure to meet the standards required by the Act have resulted in an economic benefit to Defendant.

53. The Court is aware that Defendant's improvements have resulted from significant investment. But those investments were as required. Shortfalls have come from a lack of sufficient attention and application of dollars and manpower. Moreover, Defendant's efforts were prodded in significant measure by this lawsuit. To achieve the goal of deterrence, a penalty must be high enough so that the discharger cannot "write it off" as an acceptable environmental trade-off for doing business. See PIRG v Powell Duffryn Terminals, Inc., 720 F.Supp. 1158, 1166 (D.N.J. 1989).

54. Based on a review of the facts of this case, as applied to the above-required factors, the Court imposes a penalty of $1,000 per day for each day Defendant has been in violation of the Act through poor implementation of its plans from the date of the filing of the lawsuit -- August 27, 1996 -- until the day before trial, November 3, 1998, for a total of 799 days, or $799,000. Payment of this provisional penalty will be held stayed for a period of three years, from the date of the filing of this Decision.

55. Credit against the provisional penalty. The penalty upon Defendant shall be reduced for direct costs incurred only for the following expenditures: (1) after the date of filing of the lawsuit, steps taken to improve its stormwater diversion system; and (2) for steps taken by Defendant with regard to changes in its physical plant to comply with this Decision. Direct costs are defined to include labor and materials. Direct costs shall include those direct costs incurred relating to stormwater mitigation as marginal additions to costs incurred in upgrading, improving, rehabilitating, or constructing structures at the shipyard.

56. Defendant may record the direct costs associated with these improvements and present this record to the magistrate judge after expiration of the three-year period for the Court's review. Plaintiffs may file a response to this filing. Once the court has determined an appropriate credit, based on review of the parties' filings, such credit will be subtracted from the provisional penalty. At that time, any Penalty remaining shall be paid to the U.S. Treasury, with interest at the legal rate from the date of this Decision. Any credits in excess of the penalty will mean no penalty shall be owed to the U.S. Treasury but otherwise have no effect. The Court shall have the discretion to include cots which have not actually been incurred, but which Defendant can demonstrate will be incurred at a time shortly after the expiration of the three-year period.

57. The intent of the Clean Water Act is to maintain and protect the waters of the United States. The Court believes that the penalty/credit remedy established by this Decision will better serve to forward that intent than simple penalties.

D. **Enforcement Procedures**

58. **Magistrate Judge Oversight**. Consistent with 28 U.S.C. § 636(b))(l)-(3), all reporting requirements mandated by this Decision shall be filed with the magistrate judge assigned to this case. Plaintiffs may bring before the magistrate judge any petition for relief or contempt based on activities or omissions that Plaintiffs regard as violations of the injunction. In response, Defendant may file objections to such a petition. The magistrate judge shall have discretion to order and hold an evidentiary hearing. The magistrate judge shall make a report and recommendation to this Court based on the evidence presented, along with a recommendation of remedy if deemed necessary. Should this Court decide relief is merited, it may confirm in part or whole the report and recommendation. Alternatively, this Court may proceed

with any further hearings it deems necessary or may order such additional relief it deems necessary.

59. **Reporting Requirement**. Southwest Marine shall compile and maintain a record of its daily inspection reports. On a quarterly basis, one copy of this record shall be delivered to the magistrate judge and one copy to Plaintiffs counsel. Southwest Marine shall also provide to Plaintiffs on a quarterly basis the sweep-down certification reports and corrective action reports.

60. **Inspections**. Plaintiffs shall be allowed access to Defendant's facility for inspection on four occasions per year, for the next three years. During the calendar year, no more than two inspections shall be allowed in any six-month period. Two inspections may be made on days without precipitation. Two of the inspections may be made on days with precipitation. Unused inspection days shall not carry over to the next calendar year. The duration of any inspection shall not exceed two hours from actual start of the walk-through. Plaintiffs shall be allowed no more than four individuals on any one inspection, and no more than two individuals may be experts. Plaintiffs shall provide, at minimum a two-hour notice before arrival. The hours of potential shall be limited to 9:00 a.m. to 3:00 p.m., Monday through Friday.

D. **Attorneys' Fees**

61. As the prevailing party, Plaintiffs are entitled to an award of their attorneys' and experts' fees -- including travel costs -- resulting from this litigation. See 33 U.S.C. § 1365(d). Plaintiffs shall prepare and present to the Court a summary of their fees incurred in this action within thirty days of the filing of the Judgment. Defendant may file objections to the summary with the Court. Plaintiffs' fees may include work entailed in complying with the requirements of this Decision as specified below.

62. Plaintiffs shall also be awarded attorneys' fees for the reasonable costs entailed with monitoring Southwest Marine's compliance with this Court's dictates, i.e., those costs associated with reviewing inspection reports and conducting inspections. These fees may include actual time spent during inspections for each attorney and a maximum of eight hours total per year for review of Defendant's required reports. Time spent in compliance with these maximum hours may be presented to the Court at the end of the calendar year. Upon such submission and approval, Defendant shall pay to Plaintiff these fees.

63. Plaintiffs may also be awarded attorneys' fees should they be the prevailing party in any motion brought before the Court to enforce compliance with this Court's decision.

IT IS SO ORDERED.

Dated: [9-1-99]

/s/ Rudi M. Brewster
Honorable Rudi M. Brewster
United States Senior District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 96-1492-B -BAJB

Natural Resources Defense Council,
San Diego BayKeeper, Kenneth J. Moser,
Plaintiffs,

v.

Southwest Marine, Inc.,
Defendant.

DECISION

FILED: March 3, 1999

I. Introduction

The instant matter having been presented to the Court after a bench trial, and upon review of the trial testimony and exhibits and of both Plaintiffs' and Defendant's post-trial briefs, the Court makes the following Decision.

II. Standing and Adequacy of Notice

As stated during trial, this Court has found that Plaintiffs have standing before this Court. Plaintiffs have demonstrated constitutionally cognizable injuries. Despite the progress made by Defendant in improving and enhancing its operations, Plaintiffs' allegations are not moot. Finally, this Court has determined that the notice provided to Defendant by Plaintiffs was adequate under the law.

III. Adequacy of the Stormwater Plans vis-a-vis Permit Requirements

This Court finds that despite early deficiencies, Defendant has developed stormwater prevention plans and Best Management Practices ("BMPs") which are adequate under the law, irrespective of what standard – BAT, BCT, or MEP – is applied to the question of adequacy." While Plaintiffs presented examples of plan inadequacies, Defendant effectively demonstrated that allegations of inadequacies had either been corrected or were covered within existing categories of the permits. This Court's visits to the shipyard have revealed demonstrable improvement. The testimony of Defendant's experts - Dr. Roesner, Mr. Curtis, Mr. Austin, and Mr. Halfax - as to the adequacy of the plans was compelling.

Defendant is not the stereotypical environmental "bad actor." The Court is convinced that Defendant has made a good-faith effort in its attempt to implement environmental protections. That effort may have been less aggressive without the pendency of Plaintiff's lawsuit. However, whatever the effect of this lawsuit, the plans as written are deemed adequate.

IV. Plan Implementation

Though the Court finds Defendant's plans adequate, based on the evidence presented at trial, this Court finds that Defendant's implementation/enforcement of its stormwater prevention plans has been inadequate. That inadequacy existed prior to the time of the filing of Plaintiffs suit and continues to this day. As such, Plaintiffs have demonstrated to the Court "a continuing likelihood of recurrence in intermittent or sporadic violation" of those issues in its notice letter. See Sierra Club v. Union Oil Co., 853 F.2d 667, 671 (9th Cir. 1988).

Plaintiffs have presented convincing evidence that Defendant did not make the inspections Defendant claims to

have made. Even if the Court accepted Defendant's evidence, the failure to maintain those records demonstrates shoddy practices and a lack of seriousness with which Defendant has viewed this requirement. Defendant has provided no satisfactory explanation for why approximately fifty-three percent of these inspection reports are missing.

For those inspection reports presented to the Court, a pattern of poor housekeeping is evident. Violations, even when reported, were not always timely remedied. While a substantial portion of these implementation violations may not have had a direct effect on the environment, these violations likely had some impact.

Defendant has maintained that the problems cited to this Court are mere "snapshots," and should not be taken for systemic problems. While such an argument has surface attraction, it is ultimately unconvincing. First, except for this Court's most recent visit to Southwest Marine, Defendant had adequate opportunity to remedy deficiencies prior to the inspecting party's arrival. Second, evidence to some extent is always of the "snapshot" variety. As stated, taken cumulatively, the evidentiary glimpses of Defendant's operations present a picture of overall inadequacies.

V. Causal Harms

Plaintiffs have demonstrated that the implementation inadequacies have led to significant contributions of pollutants to Defendant's leasehold and, as such, San Diego Bay.

While this case presents complications because of the substantial amount of historically-caused contaminated sediments in Defendant's leasehold, this Court finds that Defendant's failure to implement adequately its required plans has contributed to and perpetuated the contamination of the off-shore leasehold.

Trial experts agreed that the off-shore leasehold is "devoid of life." The question presented at trial was

whether the stormwater coming from Defendant's landside facility had a causal connection to the environmental condition of that offshore habitat. While no one incident of faulty implementation can be said to have caused a level of pollution so as to harm marine life, taken cumulatively, the Court finds that the evidence presented demonstrates that Defendant's operations have contributed to the contamination of San Diego Bay.

First, the evidence conclusively demonstrates that contaminants are entering the marine habitat. The testing performed by Defendant revealed substantial quantities of pollutants - metals and toxics - have entered the Bay in Defendant's stormwater discharge and because of blasting operations. Second, the Court is convinced by the evidence presented that, but for new infusions of contaminations by stormwater or faulty operations, the pattern of contaminated sediments would have revealed a decreasing trend in levels of concentration. The testimony of Mr. Barrick was undercut by the Campbell shipyard study. The persistence of paint chips and abrasive grit and lack of sedimentation in the leasehold may help explain the lack of a decreasing trend, but it is not a conclusive answer. Third, the Court is convinced that the causal harms to the Bay are harms that could be remedied by Defendant with improved practices.

VI. Relief

A. Equitable Relief

The Clean Water Act vests courts with broad authority to fashion appropriate equitable remedies. See 33 U.S.C. § 1365(a). Based on that broad authority, this Court shall retain jurisdiction over this matter for three years from the date of the filing of this Decision. Plaintiffs may petition the Court to extend this Court's jurisdiction. Upon good cause showing, the Court may extend its jurisdiction for a

reasonable time sufficient to ensure that Defendant is complying with the requirements of the Act.

1. Specific Directives

a. Testing

To the maximum extent possible, Southwest Marine shall allow no discharge of stormwater effluent from any pipe discharging into the Bay until testing has been performed for every significant known and potential pollutant that may result from shipyard operations and may be contained in the effluent. Such testing shall be performed prior to any anticipated release and no release shall be allowed until the results of such testing have been received. No discharge shall be allowed unless testing results demonstrate that the effluent complies with NPDES permit limits. Southwest Marine shall operate or modify its stormwater retention system so as to allow conformance with this requirement throughout its physical facility. Southwest Marine shall maintain records of such testing, and make copies available for review by this Court and Plaintiffs at Defendant's expense.

b. Sweep downs and certifications

Southwest Marine shall conduct sweep downs after every shift of areas in which operations may have caused deposit of debris. After each sweep down, certification will be made that no debris remains in the area. Alternatively, Southwest Marine shall certify that no debris was created and thus no sweep down was necessary. All certifications shall clearly state the certifying employee and shall be made subject to penalty of perjury.

c. Inspections and Recordkeeping

Southwest Maxine shall make daily inspections of its physical plant. Records shall be maintained for each inspection. Conditions causing or having the potential to cause pollutants to enter the Bay shall be noted in detail. No such inspections shall be required for periods in which the

shipyard is not conducting operations. Inspection reports shall note such time periods. All daily inspections shall be certified as correct, and each report shall clearly state the certifying employee and shall be made subject to penalty of perjury.

d. Water Column Testing

On one occasion for each vessel - whether in drydock or at pier side - on which blasting or painting operations are conducted, Defendant shall perform testing of the surrounding water to determine if such operations are contributing to pollution levels in San Diego Bay. Such testing shall be performed on a day in which blasting or painting operations constitute a majority of the operations conducted during a shift. Should no such day exist, testing shall be done on the day of greatest blasting or painting activity. Defendant shall divide such testing equally between painting and blasting operations.

Within two hours of such blasting or painting activity, Defendant shall perforin water column pollution tests in at least four locations surrounding the vessel. Such locations shall be located within 50 to 100 feet distance from the vessel, and at least 200 feet apart from each other. For each location, water shall be sampled at the surface, and at each 20-foot interval between the water surface and the bottom of the Bay.

The results of such tests shall be certified in a manner consistent with the provisions of this Decision, and shall be furnished on a quarterly basis to the Magistrate Judge, with one copy provided to Plaintiffs.

e. Corrective Action

Conditions with potential to allow pollutants to enter the Bay shall be corrected within four hours after observation. Southwest Marine shall certify that such corrective action has been made. Should it not be feasible to take corrective action within four hours, Defendant shall take corrective

action in an expeditious manner. Defendant shall state in writing the reason why it was not feasible. Feasibility should be narrowly construed and should, with reason, apply only to mechanical or structural problems.

All certifications shall note the manner of corrective action and the time period in which such action was taken. All certifications shall clearly state the certifying employee and shall be made subject to penalty of perjury.

2. Physical Plant Improvements

a. Shrouds

Southwest Marine shall repair and/or replace shrouds which are in poor repair, defined as in a state that may allow more than *de minimis* quantities of debris from blasting, painting, or other similar operations from entering the Bay. Such repair and/or replacement shall take place within a reasonably expeditious period of time. Defendant subsequently shall maintain and/or replace shrouds which do not meet this criterion.

b. Piers

Southwest Marine shall capture all stormwater runoff coming off any and all piers. No scuttling of runoff from piers will be allowed. Defendant shall take steps to meet this requirement in a reasonably expeditious manner.

c. Berms

Southwest Marine shall erect and maintain concrete berms in all areas of its physical plant from which runoff may enter the Bay. In areas that experience significant pooling of water, and which threaten to cause discharge into the Bay, Defendant shall pump out such areas on an expeditious basis so as not to allow such discharges. Should areas, including piers, be constructed or re-constructed, Defendant instead may rely on sloping and drainage so long as such a drainage system will accommodate flows from even heavy periods of rainfall. Should this alternative be taken, berms need not be constructed. Should this alternative be

taken, Defendant shall certify to the Court that such a system is as adequate as any berm system.

3. Contaminated Sediments Cleanup

Without deciding the question of its jurisdiction to order cleanup of Defendant's contaminated sediments to specific standards, the Court declines to accept Plaintiffs' invitation to issue such an order at this time. As noted, the majority of the pollution existing in the off-shore leasehold is present because of historical practices at the shipyard before Defendant obtained ownership. Defendant has begun the process of remediation on the marine railways. Defendant will soon begin the process of remediating the rest of the leasehold. The cleanup standard to which the rest of the leasehold must comply will be determined after hearings before the State Water Resources Control Board. The Court chooses not to interfere in that process, and sees insufficient reason why Plaintiffs should be accorded financial assistance at this time to be involved in that process.

B. **Penalties**

1. Penalty Amount

The Clean Water Act mandates civil penalties for the violations found in this lawsuit. See 33 U.S.C. § 1319(d). Such penalties may not exceed $25,000 per day. Id. Orders issued by this Court on November 30, 1999 and January 28, 1999 have concluded that civil penalties are available to the Plaintiffs. While civil penalties are mandatory if the Court finds violations, the amount assessed is wholly within the discretion of the court. See Atlantic States Legal Foundation v. Tyson Foods, Inc., 897 F.2d 1128, 1142 (11th Cir. 1990); Stoddard v. Western Carolina Regional Sewer Authority, 784 F.2d 1200, 1208 (4th Cir. 1986). "In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any

history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." 33 U.S.C. § 1319(d).

The Court does not believe such factors can be mechanistically applied. Any violation of the Clean Water Act should be regarded as serious. However, Defendant's violations have not been willful in the sense of a specific intent to violate. Moreover, while this Court has concluded that there is a link between the violations and harm to the Bay, the causation is less-than-direct. There has been no showing that any particular violation has resulted in immediate harm; the effect is apparent when taken on a cumulative basis. Defendant's experts have convinced the Court that the harms caused are not grave ones, at least in the context of the already polluted conditions. Such a conclusion allows the Court to find that Defendant did not act with deliberate indifference to the health of the Bay. Certainly, this is not a case of massive spills and fish-kills. The Court also believes that Defendant has made good-faith efforts to meet the dictates of the Act's requirements, though it has fallen short with regard to implementation. However, failure to meet the standards required by the Act have resulted in an economic benefit to Defendant. The Court is aware that Defendant's improvements have resulted from significant investment. But those investments were as required. Shortfalls have come from a lack of sufficient attention and application of dollars and manpower. Moreover, Defendant's efforts were prodded in significant measure by this lawsuit. To achieve the goal of deterrence, a penalty must be high enough so that the discharger cannot "write it off" as an acceptable environmental trade-off for doing business. See PIRG v. Powell Duffryn Terminals, Inc., 720 F.Supp. 1158, 1166 (D.N.J. 1989).

Based on a review of the facts of this case, as applied to the above-required factors, the Court imposes a penalty of $1,000 per day for each day Defendant has been in violation of the Act through poor implementation of its plans from the date of the filing of the lawsuit -- August 27, 1996 -- until the day before trial, November 3, 1998, for a total of 799 days, or $799,000. Payment of this provisional penalty will be held stayed for a period of three years from the date of the filing of this Decision.

2. Credits against the provisional penalty

The penalty imposed upon Defendant shall be reduced for direct costs incurred only for the following expenditures: (1) after the date of filing of the lawsuit, steps taken to improve its stormwater diversion system; and (2) for steps taken by Defendant with regard to changes in its Physical plant to comply with this Decision. Direct costs are defined to include labor and materials. Direct costs shall include those direct costs incurred relating to stormwater mitigation as marginal additions to costs incurred in upgrading, improving, rebabilitating, or constructing structures at the shipyard.

Defendant may record the direct costs associated with these improvements and present this record to the magistrate judge after expiration of the three-year period for the Court's review. Plaintiffs may file a response to this filing. Once the Court has determined an appropriate credit, based on review of the parties' filings, such credit will be subtracted from the provisional penalty. At that time, any penalty remaining shall be paid to the U.S. Treasury, with interest at the legal rate from the date of this Decision. Any credits in excess of the penalty will mean no penalty shall be owed to the U.S. Treasury but otherwise have no effect. The Court shall have the discretion to include costs which have not actually been incurred, but which Defendant can demonstrate will be incurred at a time shortly after the expiration of the three-year period.

The intent of the Clean Water Act is to maintain and protect the waters of the United States. The Court believes that the penalty/credit remedy established by this Decision will better serve to forward that intent than simple penalties.

C. **Enforcement Procedures**

1. Magistrate Judge Oversight

Consistent with 28 U.S.C. § 636(b)(l)-(3), all reporting requirements mandated by this Decision shall be filed with the magistrate judge assigned to this case. Plaintiffs may bring before the magistrate judge any petition for relief or contempt based on activities or omissions that Plaintiffs regard as violations of the injunction. In response, Defendant may file objections to such a petition. The magistrate judge shall have discretion to order and hold an evidentiary hearing. The magistrate judge shall make a report and recommendations to this Court based on the evidence presented, along with a recommendation of remedy if deemed necessary. Should this Court decide relief is merited, it may confirm in part or whole the report and recommendation. Alternatively, this Court may proceed with any further hearings it deems necessary or may order such additional relief it deems necessary.

2. Reporting Requirement

Southwest Marine shall compile and maintain a record of its daily inspection reports. On a quarterly basis, one copy of this record shall be delivered to the magistrate judge and one copy to Plaintiffs' counsel. Southwest Marine shall also provide to Plaintiffs on a quarterly basis the sweep down certification reports and corrective action reports.

3. Inspections

Plaintiffs shall be allowed access to Defendant's facility for inspection on four occasions per year, for the next three years. During the calendar year, no more than two inspections shall be allowed in any six-month period. Two

inspections may be made on days without precipitation. Two of the inspections may be made on days with precipitation. Unused inspection days shall not carry over into the next calendar year.

The duration of any inspection shall not exceed two hours from actual start of the walk-through. Plaintiffs shall be allowed no more than four individuals on any one inspection, and no more than two individuals may be experts. Plaintiffs shall provide, at minimum, a two-hour notice before arrival. The hours of potential inspection shall be limited to 9:00 a.m. to 3:00 p.m., Monday through Friday.

D. **Attorneys' Fees**

As the prevailing party, Plaintiffs are entitled to an award of their attorneys' and experts' fees - including travel costs - resulting from this litigation. See 33 U.S.C. § 1365(d). Plaintiffs shall prepare and present to the Court a summary of their fees incurred in this action. Defendant may file objections to the summary with the Court. Plaintiffs' fees may include work entailed in complying with the requirements of this Decision as specified below.

Plaintiffs shall also be awarded attorneys' fees for the reasonable costs entailed with monitoring Southwest Marine's compliance with this Court's dictates, i.e. those costs associated with reviewing inspection reports and conducting inspections. These fees may include actual time spent during inspections for each attorney and a maximum of eight hours total per year for review of Defendant's required reports. Time spent in compliance with these maximum hours may be presented to the Court at the end of the calendar year. Upon such submission and approval, Defendant shall pay to Plaintiffs these fees.

Plaintiffs may also be awarded attorneys' fees should they be the prevailing party in any motion brought before the Court to enforce compliance with this Court's decision.

VII. Conclusion

Plaintiffs shall prepare for this Court proposed findings of fact and conclusions of law, and judgment, consistent with this Decision. This document shall be submitted to the Court within 30 days of the filing of this Decision. Defendant shall have fifteen days from receipt to respond with objections.

IT IS SO ORDERED.

Dated: [3-2-99]

/s/ Rudi M. Brewster
United States Senior District Judge

cc: All Parties
Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 96-1492-B (AJB)

Natural Resources Defense Council,
San Diego BayKeeper, Kenneth J. Moser,
Plaintiffs,

v.

Southwest Marine, Inc.,
Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTIONS TO STRIKE

FILED: November 26, 1991

1. Case Type and Jurisdiction

This is a citizen enforcement action for alleged violations of the Federal Water Pollution Control Act (FWPCA). 33 U.S.C. § 1365. The Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 and 33 U.S.C. § 1365(a)(1).

II. Background

Plaintiffs Natural Resources Defense Council, Inc. ("NRDC"), San Diego Baykeeper, Inc., and Kenneth Moser filed suit against Southwest Marine, Inc. for allegedly violating numerous provisions of the Federal Water

Pollution Control Act, 33 U.S.C. §§ 1365 et seq. Plaintiffs allege that Defendants unlawful and excessive discharges of water pollution from its bayside facility contribute noxious pollutants to San Diego Bay and the Pacific Ocean, and that Defendant has failed to develop and/or implement several environmental compliance and monitoring plans as required by the FWPCA.

Defendant operates a ship repair and modernization facility located at the foot of Sampson Street in San Diego. The facility includes marine railways, dry docks, piers, wharfs, a reclamation yard, a sand blast area, and assembly and work areas. Plaintiffs allege that Defendant discharges materials into San Diego Bay from the following activities: floating drydock deballasting, floating drydock submergence and emergence, floating drydock operations, marine railway operations. berth and pier operations, stormwater, boiler and cogeneration feedwater, fire protection system discharges, cooling water, and miscellaneous flows. Plaintiffs allege that these unlawful discharges pollute San Diego Bay and the Pacific Ocean.

Plaintiffs include two environmental public interest groups whose members use San Diego Bay for recreation and one individual who uses San Diego Bay for recreation.

To file a citizen suit under the FWPCA, a party must deliver sixty days advance notice of the alleged violations to the EPA, relevant state agency, and the alleged violator. 33 U.S.C. § 1365(b)(1)(A). On April 30, 1996, Plaintiffs sent a letter to Defendant copied to the requisite federal and state offices, declaring their intent to sue to redress Defendant's alleged violations. The statutory notice provision has now been satisfied because more than sixty days have passed since notice was provided, and no governmental agencies have acted to redress the alleged violations. Defendant previously filed a motion to dismiss claiming that Plaintiffs' notice letter was deficient. On November 5, 1996, the Court denied this motion.

Plaintiffs' claims focus on alleged violations of two separate programs of the National Pollutant Discharge Elimination System ("NPDES") that regulate Defendant's discharges into San Diego Bay under the FWPCA. Defendant's industrial discharges are governed under its own site-specific NPDES industrial discharge permit, and its stormwater discharge is regulated by the standards of the NPDES California General Industrial Permit. Defendant was issued NPDES Permit No. CA0107697 for its industrial discharges in 1983, and it secured coverage under the NPDES General Industrial Permit No. CAS000001 in 1992.[1] All discharges not authorized by and in conformance with NPDES permits violate the FWPCA.

Plaintiffs' first cause of action alleges the following violations of Defendant's industrial discharge NPDES permit: (1) Defendant pollutes San Diego Bay by discharging toxic pollutants and hazardous substances; and (2) Defendant has failed to develop and implement an adequate Best Management Practices Program ("BMP").

Plaintiffs' second cause of action alleges that Defendant's stormwater discharge violates the NPDES General Industrial Permit by: (1) failing to eliminate non-stormwater discharges from the stormwater system, (2) failing to develop and implement a stormwater Pollution Prevention Plan ("SWPPP"), and (3) failing to develop and implement a Monitoring and Reporting Program, also described as a Stormwater Pollution Prevention Monitoring Plan ("SWPPMP").

On January 6, 1997, Defendant filed a motion for summary judgment. Defendant argued that the Court lacked subject matter jurisdiction because Plaintiffs' allegations of ongoing violations were not made in good faith

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[1] Water Quality Order No. 91-13-DWQ (as amended by Water Quality Order 92-12 DWQ) issued pursuant to Section 402 of the Act, 33 U.S.C. §1342.

or based upon a reasonable investigation. Furthermore, Defendant argued that, even if the Court exercises subject matter jurisdiction, summary judgment should be granted because Plaintiffs failed to establish that they can prove ongoing violations at trial. Finally, Defendant argued that Plaintiffs' claims were moot. On February 3, 1997, the Court ordered that the motion be continued to allow Plaintiffs more time to conduct discovery.

III. Discussion

A. Standard of Law

Federal Rule of Civil Procedure 56(c) provides that summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." One of the principal purposes of the rule is to dispose of factually unsupported claims or defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

In considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). A moving party who does not bear the burden of proof at trial may discharge his burden of showing that no genuine issue of material fact remains by demonstrating that "there is an absence of evidence to support the non-moving party's case." Celotex, 477 U.S. at 325. The moving party is not required to produce evidence showing the absence of a genuine issue of material fact on such issues, nor must the moving party support its motion with evidence negating the non-moving party's claim, Lujan v. National Wildlife Federation, 497 U.S. 871, 885 (1990). Instead, "the motion may, and should be granted so long as whatever is before the District Court demonstrates that the standard for the entry of judgment,

as set forth in Rule 56(c), is satisfied." Lujan, 497 U.S. at 885 (quoting Celotex, 477 U.S. at 323).

B. Motion for Summary Judgment

1. Subject Matter Jurisdiction

As discussed above, Plaintiffs' allegations of violations of the two NPDES permits include claims of ongoing illegal discharges and failure to develop and implement required supporting plans. The alleged illegal discharges would result, at least in part, from the deficiency of the plans.[2] The deficient plans, as cited by Plaintiffs' Complaint, are the BMP required for the industrial permit and the SWPPP and SWPPMP for the stormwater permit.

On August 23, 1997, four days prior to the filing of this suit Defendant submitted a revised SWPPP to the San Diego Regional Water Quality Control Board ("Regional Board"). Attached to the new SWPPP was the 1992 version of Defendant's BMP and a first SWPPMP. Defendant contends that the allegations in Plaintiffs' Complaint that refer to their failure to develop and implement a BMP, SWPPP and SWPPMP (collectively, the "plans") refer to the old versions of these plans. Under the new versions, Defendant alleges that there will be no continuing violations of the FWPCA, and therefore the Court lacks subject matter jurisdiction over this case.

Section 505(a) of the FWPCA provides that "any citizen may commence a civil action on his own behalf - (1) against any person ... who is alleged to be in violation of (A) an effluent standard or limitation, . . ." 33 U.S.C. § 1365(a).

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[2] The Court finds it unnecessary at this time to determine whether the allegations of ongoing illegal discharges form the basis of an independent cause of action or whether they are offered as evidence to support Plaintiffs' claims that Defendant has failed to develop and implement required plans. If the claims are to be pursued independently, Plaintiffs may later be required to show that such claims were adequately noticed in its April 30, 1996 letter to Defendant.

The Supreme Court interpreted the phrase 'to be in violation' to require either an ongoing violation or the likelihood of a future violation of the FWPCA, and to bar citizen suits maintained wholly on past violations. Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 61-64,67 (1987). To establish subject matter jurisdiction over a FWPCA suit, a plaintiff need only make goodfaith allegations of ongoing continuous or intermittent violations. Sierra Club v. Union Oil Co., 853 F.2d 667,670 (9th Cir. 1988); see also Gwaltney, 484 U.S. at 64. To defeat jurisdiction, a defendant must show that the allegations fail to satisfy the "reasonable inquiry" requirements of Rule 11. Sierra Club v. Union Oil, 853 F.2d at 669; see FED. R. CIV. P. 11.

Two sets of Plaintiffs' claims must be subjected to the good-faith pleading standard: (1) the illegal discharge claims and (2) the failure to develop and implement required plans claims.

a. Illegal Effluent Discharges

Plaintiffs allege that Defendant continues to discharge water pollution into San Diego Bay in violation of its industrial discharge permit and the stormwater discharge regulations. The Complaint states that Defendant "has violated, and continues to violate, numerous requirements of the [Clean Water] Act governing the discharge and abatement of polluted water, polluted stormwater, and other substances ('water pollution') into San Diego Bay."

Effluent discharges, particularly rain-induced stormwater drainage, are inherently intermittent and sporadic and qualify as a continuing discharge even when they do not occur every day. As long as Defendant's facility is exposed to rain and tidal activity, discharges will occur. See Molokai Chamber of Commerce v. Kukui, 891 F. Supp. 1389, 1401 (D. Hawaii 1995) (circumstances where pollutant is discharged in stormwater each time it rains constitutes a

continuing discharge). Therefore, the Court has subject matter jurisdiction over these claims if it finds that Plaintiffs could in good faith allege a likelihood that illegal discharges might recur in the future.

Plaintiffs submit a document from the Regional Board that details a pattern of NPDES permit violations at Defendant's facility, with twenty-four violations over a period of ten years.[3] Plaintiffs also submit an affidavit from one of their attorneys which states that "[b]ased on my continuing review and knowledge of the evidence in this case, I continue to believe that Defendant is violating the Act in numerous respects." This evidence of a longstanding pattern of violations sufficiently suggests a likelihood of continued sporadic or intermittent violations in the future.

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3 These violations, recorded between October 30, 1986 and June 16, 1995, include violations of both the stormwater General Industrial Permit and the Industrial NPDES pemit. The documentation includes: (1) a document from the Regional Board evidencing 24 discharges in violation of the FWPCA. (2) three of Defendant's annual reports to the Regional Board which plaintiffs allege demonstrate Defendant's violation of stormwater discharge requirements; and (3) a Staff Report from the Regional Board that indicates that the sediments in San Diego Bay adjacent to Defendant's facility are high in heavy metals and other pollutants. See P1 . NOS Exs. 1, 2, 3, 5, 6. These documents evidence a pattern of violations over at least the past ten years. This pattern warrants a presumption that these discharges could continue in the future. The presumption created by ten years of illegal discharges cannot be defeated by four days of compliance during the brief period between the adoption of the new SWPPP and the filing of the Complaint.

In February, Defendant moved to strike this document for lack of foundation because it did not attribute any authorship. Plaintiffs now supply the deposition testimony of Kristin Schwall of the Regional WaterBoard staff, who claims the chart was authored by her for use by the board in its ordinary course of business. Pla. Supp. Opp. p. 9, fn. 6, Pla. Supp. NOL Ex. 2, pp. 8- 10. Therefore, Defendant's motion to strike is denied.

Defendant contends that its new environmental compliance and monitoring plans will ensure that there are no future violations. However, the exercise of subject matter jurisdiction requires only a showing that allegations were made in good faith, and not actual proof. Plaintiffs may in good faith doubt Defendant's promises in view of its history of noncompliance. Finally, as discussed below, Plaintiffs have alleged specific instances of continuous and ongoing illegal discharges. Therefore, subject matter jurisdiction exists over the illegal discharge claims.

b. Environmental Compliance and Monitoring Plans

Plaintiffs allege in their Complaint that Defendant has failed to "develop and implement" a BMP, SWPPP and a SWPPMP as required by the Federal Water Pollution Control Act. Plaintiffs state that Defendant (1) has failed to implement a BMP that adequately serves to reduce and eliminate discharges of water pollution from its facility; (2) has failed to implement a SWPPP that lists pollutants likely to be present in Stormwater or that provides for the Stormwater management controls appropriate for the facility; and (3) has failed to comply with the regulations governing a SWPPMP by failing to conduct adequate visual observations of Stormwater discharge, failing to collect and analyze samples of Stormwater, and failing to notify the Regional Board of instances of non-compliance. The Complaint provides more specific examples of how these plans are deficient and suggests the likelihood of other inadequacies.

Defendant argues that its implementation of new plans four days before Plaintiffs filed their Complaint deprives the Court of subject matter jurisdiction over Plaintiffs' claims that these plans are legally inadequate. In making this argument, Defendant assumes that its new plans remedy all violations embodied in the old plans. If these new plans still do not fully comply with the Federal Water Pollution Control Act, then there is a continuing violation of the

FWPCA and the Court has subject matter jurisdiction over these claims. See City of New York v. Anglebrook Limited Partnership, 891 F.Supp.. 900, 905 (S.D.N.Y. 1995) (finding subject matter jurisdiction because "the City claims a present violation -- a flawed plan filed in violation of permit requirements -- that is an actionable violation of an effluent standard under § 1365(f)(6)").

Defendant submits a declaration from an environmental consultant (who used to be their Industrial Environmental Manager) which states that their new plans are all in compliance with their permits and the FWPCA. Austin Decl. ¶¶12, 16, 20, 22. Upon the completion of the additional discovery time allotted by the Court, Plaintiffs argue that the "new evidence establishes that [Defendant's] conduct has been far worse than originally known. This new evidence lends further support to plaintiffs' contentions that the plans themselves, and [Defendant's] implementation of them, are deficient."

The Court differentiates between alleged deficiencies in the development of the required plans and deficiencies in the implementation of such plans. If Plaintiffs objected only to the former, then the adoption of new plans would terminate the cause of action as strictly a past violation unless Plaintiffs made good faith allegations that the new plans were also legally deficient. If however, Plaintiffs' Complaint alleges implementation deficiencies, then Plaintiffs can in good faith fear that the substitution of one allegedly hollow plan for another may not change Defendant's behavior.

The Court has jurisdiction to adjudicate implementation failures because the development of new plans does not extinguish the continuing nature of Defendant's implementation failures. If Defendant failed to collect samples or eliminate illegal discharges under the old plans, there is reason to believe that they will continue to fail to do so wider the new plans. If the opposite presumption were

true, a defendant could always draft a new plan when threatened with litigation and claim a complete defense. A potential plaintiff would be forced to wait until defendant violated the FWPCA under its new plan before it could file suit. Defendant could then create yet another new plan, and the cycle would begin again.

At the time of the February hearing, it was not clear to the Court whether it had jurisdiction to adjudicate the alleged development failures of the plans. Defendant had submitted an affidavit attesting that its new plans were in compliance with all requirements of its permits and the FWPCA. See Austin Decl. ¶¶ 12, 16, 20, 22, while Plaintiffs had not clearly disputed these assertions as to both development and implementation. However, Plaintiffs' supplemental opposition, prepared with the benefit of additional discovery, has satisfied the Court's concerns.

Plaintiffs' supplemental opposition alleges that Defendant's former environmental coordinator testified in a recent deposition that Defendant's BMP plan was deficient as recently as 1995. Defendant has not revised its BMP since 1992, and it submitted the 1992 version with its 1996 SWPPP. An adequate BMP is an important element of compliance for both of Defendant's NPDES permits. Many of Defendant's past discharge violations occurred under the 1992 BMP that is still in effect today. Defendant's refiling of the same BMP with its revised SWPPP does not end good faith speculation that violations of the stormwater permit are likely to continue in the future. Furthermore, Defendant has not supported its motion for summary judgment of the industrial discharge claim, since it never revised the BMP that forms the basis of Plaintiffs' contentions.

Therefore, the Court may exercise subject matter jurisdiction over Plaintiffs' claims that Defendant has failed to develop adequate plans as required by its NPDES permits.

2. The Merits: Proof or Evidence of Ongoing and Future Violations

Plaintiff may survive Defendant's motion for summary judgment "either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of recurrence in intermittent or sporadic violations." Sierra Club v. Union Oil, 853 F.2d at 671.

In February, Plaintiffs argued that they could not yet prove the extent and severity of the FWPCA violations because there had been no meaningful discovery. The Court continued the motion for summary judgment at that time to allow ample time for the discovery sought by Plaintiffs, pursuant to FED. R. CIV. P. 56(f). Now that this discovery has been completed, the Court seeks to determine whether any material questions of fact remain that prevent judgment from being entered at this time.

Plaintiffs can prevail at trial by showing either that Defendant's plans are inadequate facially or as applied, or by establishing that there are or will likely be ongoing violations of the NPDES permits.

a. Are the Plans Defective as Written?

EPA's regulations define "best management practices" as "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of 'waters of the United States.' BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage." 40 C.F.R. § 122.2. Defendant's BMP, last modified in 1992, is an important element of both its industrial and stormwater discharge responsibilities.

As discussed above in regards to subject matter jurisdiction, a defective or inadequate BMP would implicate both of Defendant's NPDES permits. Plaintiffs argue that a material question of fact on this point is created by statements of a former employee of Defendant. Plaintiffs' supplemental opposition cites deposition testimony of Daniel Mills, Defendant's former environmental coordinator. Mills answered that there was "some internal concern over the usability" of the BMP; that the plan "wasn't really designed as a policy that was effective" because it was "developed by an outside agency not for [Defendant];" and that there was discussion about the BMP to make the plan more specific to Defendant's facility.

However, the Mills excerpts do not include any direct admission that the BMP's shortcomings rise to the level of a NPDES violation. In fact, Mills also testified that he believed that the SWPPP, which necessarily includes the BMP, is legally adequate. By their nature, no BMP will ever be perfect, and consideration of improvements by itself does not constitute any admission. It is interesting that Mills apparently did not use the BMP in his daily inspection routines (See Pl. Supp. NOL Ex. 3, p. 65), but Plaintiffs do not explicitly allege that such a failure is a *per se* violation of the permits.

Therefore, Mills' statements do not *prove* that the BMP was legally defective. However, do they constitute evidence from which a reasonable trier of fact could find a continuing likelihood of future violations? If a jury interpreted Mills' testimony to mean that the BMP was not used by Defendant in its daily practices, such a finding would help to support a finding for Plaintiffs.

Plaintiffs next argue that the plans are insufficient as evidenced by Defendant's own past record of violations. Defendant has not revised its BMP since 1992, and it submitted the 1992 version with its 1996 SWPPP. An adequate BMP is an important element of compliance for

both of Defendant's NPDES permits. Many of Defendant's past discharge violations occurred under the same 1992 BMP that is still in effect today. Therefore, these violations are not only past violations, but also evidence a present and ongoing failure to maintain an adequate BMP as required by the NPDES permits.

Defendant argues that Plaintiffs have failed to provide expert testimony essential to their case. In its reply, Defendant notes that Plaintiffs' first opposition stated:

> This case involves numerous technical issues. At the appropriate time, plaintiffs will designate experts on various matters. These experts will provide their opinions about matters such as [Defendant's] non-compliance with the law, the effects such noncompliance has on the environment and how [Defendant] must address its noncompliance and ameliorate any problems created by its activities.

Defendant maintains that Plaintiffs have failed to deliver on this promise, and therefore have failed to refute the testimony of Defendant's experts that the plans do not violate the NPDES permits. Defendant offers the expert testimony of Mr. Dana Austin, an environmental consultant retained by Defendant since 1996. Mr. Austin served as Defendant's Corporate Manager of Environmental Affairs from 1991-1995, and, in his words, "was the person principally responsible for overseeing the compliance of corporate and divisional industrial operations with environmental regulations ... [including] the Clean Water Act." Defendant relies heavily on what it claims to be the undisputed expert assertions by Austin that since August 23, 1996, Defendant has implemented all necessary plans and is otherwise in compliance with the conditions of its two NPDES permits. Austin Declaration ¶¶ 11, 12, 15, 16, 19, 20, and 22. Defendant argues that Plaintiffs have failed to rebut this expert testimony with expert testimony of their

own, and that therefore summary judgment must be granted. These contentions from the Austin Declaration form the entirety of Defendant's separate statement of undisputed facts in support of its motion for summary judgment.

The Court finds that the allegations and evidence submitted by Plaintiffs place in dispute the assertions made by Mr. Austin. Expert testimony can be rebutted by factual allegations in lieu of contrary expert testimony. Furthermore, Plaintiffs argue that the testimony of Austin has been seriously impeached. They claim that his deposition revealed that his "conclusory opinions were exposed for their lack of significance," and that he "took a classic 'head-in-the-sand' approach to Defendant's culpability. Plaintiffs further allege that Austin "never bothered to review highly relevant evidence."

Next, Plaintiffs allege that Defendant's SWPPP is defective on its face because it fails to list all likely pollutants in its stormwater discharges. SWPPPs must include a "list of pollutants that are likely to be present in stormwater discharge in significant quantities, and an estimate of the annual quantities of these pollutants in stormwater discharge." Defendant's NOL Ex. 3, Sec. A. 4(d). Plaintiffs submit a Regional Board staff memorandum, dated April 19, 1996, that discusses Defendant's proposed SWPPP. The internal memo noted that Defendant's "sampling plan does not include analysis for all materials [Defendant] is known to be handling such as rust inhibitors, solvents, chlorine, anticorrosive and antifouling paints, cooling and fire waters, petroleum chemicals. Annual reports have no data on TBT, PAH, PCB, and TPH. Pl. NOL Ex. 4, p. 1. Defendant's list of ten possible stormwater pollutants in its implemented SWPPP does not include any of the chemicals cited by the region staff member. Def. NOL Ex. 2, SWPPP Section C. These contentions, not

directly countered by Defendant, leave a triable question of fact as to the sufficiency of the SWPPP.

The Court finds that triable issues of fact remain whether Defendant adequately developed the necessary plans to be in compliance with its NPDES permits.

b. Is the Implementation of the Plans Deficient?

Plaintiffs supply testimony and documented evidence that allegedly shows that Defendant violates the NPDES permits in practice. Before reviewing these allegations, it must be noted that Plaintiffs are not suing Defendant for specific discharges; rather, evidence of past behavior is offered to show a pattern that could support a finding of ongoing and/or likely future violations by Defendant.[4] Among the factors outlined in Union Oil, Plaintiffs may satisfy their burden of proof by establishing violations that continue *on or after the date the complaint is filed.* Any argument by Defendant that concedes (or fails to refute) a post-Complaint violation but professes a current compliance is an attempt at a mootness defense. While courts have recognized that the doctrine of mootness prevents the maintenance of a suit when "there is no reasonable expectation that the wrong will be repeated," the Defendant bears a heavy burden to establish mootness and must demonstrate that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to occur. ... Mootness doctrine thus protects defendants from the maintenance of suit under the Clean Water Act based solely on violations wholly unconnected to any present or future wrongdoing, while it also protects plaintiffs from

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[4] The evidence of past behavior is only offered to support Plaintiffs' claim that the required plaintiff documents are inadequate. Therefore, the sufficiency of Plaintiffs' Notice Letter is not implicated by the use of this evidence. Defendant's Reply (at p. 3) contemplates that evidence of a discharge could provide evidence of a failure of a compliance plan.

defendants who seek to evade sanction by predictable protestations of repentaince and reform." Gwaltney, 484 U.S. at 66-67 (citations and internal quotation marks omitted).

Plaintiffs allege, and Defendant responds to, the following specific violations:

1. Plaintiffs allege that Defendant's marine railways "remain a serious and ongoing water pollution problem and currently result in the ongoing discharge of contaminated water and materials into San Diego Bay." Plaintiffs allege that on their March 25, 1997 site visit, they conducted physical sampling of the marine railways area, and that laboratory analysis of the samples revealed high levels of copper. zinc, oil and grease. Pla. Supp. NOL Ex. 20, pp. 2-4.

Plaintiffs allege that the conditions at the marine railways violate both permits. The NPDES permit requires that sump areas and waste dams be cleaned out on a regular basis, and "within one working day of vessel departure." BMP #s 9, 12; Def. NOL Ex. 2. No ship was in the railway during the site visit and therefore a finding could be supported that Defendant fialed to clean the railway as required. Furthermore, the polluted condition of the railway could dallow non-stormwater dischrages prohibited by the stormwater permit. Therefore. the condition of the marine railways involves triable issues of fact that could support NPDES permit violations.

2. Plaintiffs allege that their site inspections of Defendant's facility, conducted in March and April 1997, "revealed ongoing violations." Plaintiffs allege that Defendant has a "history of 'preparing' for such inspections in such a way that conceals the usual operating practices." Even still, they allege that their inspections revealed violations of the permits. In addition to the marine railway discussed above, plaintiff Kenneth Moser stated in his sworn declaration that the condition of the shipyard and grounds violated the

NPDES permits. Moser testifies that he collected samples, later analyzed by Pacific Treatment Analytical Services, Inc., that revealed significant quantities of oil, grease, copper and zinc.

The stormwater General Permit includes a "good housekeeping" provision that requires the maintenance of "clean, orderly facility areas that discharge stormwater." General Permit No. CAS000001, Section A.5(c). The evidence of alleged presence of toxic chemicals creates a triable issue of fact as to whether Defendant violated the "good housekeeping " clause.

3. Plaintiffs allege that Defendant's employees do not conduct BMP inspections on a daily basis, as allegedly required by both permits. Plaintiffs allege that Defendants have failed to provide in discovery reports for "numerous days," including between August 29 and September 4, 1996. Plaintiffs maintain that it is therefore reasonable to assume that these records are unavailable because the inspections were never conducted.

Defendants argue that BMP inspections are not required. Defendant's own SWPPP provides that "[i]nspections are conducted both on a daily (Daily BMP Inspection) and Bi-Monthly ... basis. Def. NOL Ex. 2 SWPPP § F(ii). While the provisions of the General Industrial Permit do not require daily inspections, they do require dischargers to include inspection plans to be approved as part of their SWPPMP. Dischargers are required to abide by the terms of their SWPPPs and SWPPMPs. Some degree of deviation from individual plans not required by the General Permit probably should be disregarded, or companies would have a disincentive to propose plans stronger than the minimal requirements. The absence of a few days of reports is a de minimis violation, unless a showing of bad faith is made. However, the claim that "numerous" reports are missing may create a liable question of fact.

4. Plaintiffs allege that, at the time of the filing of the Complaint, Defendant was discharging 2.16 million gallons per day of chlorine-contaminated water in violation of the stormwater permit. The page in their lodgements that supports this finding appears to be missing (they cite Pla.'s Supp NOL Ex. 15 attachment at 3). According to the deposition of Armando DeQuesada, Defendant's environmental manager, the chlorination of "seawater intake" stopped near the end of 1996. Pla. Supp. NOL Ex. 9, p. 165-166. Therefore, these violations were occurring condnuously at the time the Complaint was filed in August 1996. This individual claim is vulnerable to a mootness defense because it appears that Defendant has installed a new system that has ended these discharges. The Court reserves judgment on this question for future proceedings, if necessary.

5. Plaintiffs allege that stormwater collected in February 1997 "revealed the highest levels of the pollutants Total Suspended Solids ("TSS"), copper and lead ever reported in [Defendant's] stormwater." Plaintiffs provide as an exhibit a data sheet from Defendant's records that includes a series of numbers apparently reporting levels of various chemicals at various times and places between 1992 and 1997. Pla. Supp. NOL Ex. 18, p. 57. The levels of the three above-mentioned chemicals were in fact higher on February 10, 1997 at outfall #2, than any of the other eight dates included in the chart.

Defendants counter the February data by arguing that Plaintiffs failed to provide expert testimony or to show that the reported concentrations "adversely impact human health or the environment." Defendant is correct that the data alone does not establish a *prima facie* violation; however, the information was offered by Plaintiffs to impeach. The assertion that the new SWPPP has improved Defendant's stormwater performance.

Plaintiffs further allege that Defendant does not monitor the adequacy of the required list of stormwater discharge pollutants on its SWPPP. Plaintiffs offer deposition testimony of Mr. Armando DeQuesada, Defendant's environmental manager who compiled the 1997 samples. Mr. DeQuesada said that he did not conduct any additional independent research to determine whether the SWPPP list was satisfactory. It is not clear that he was aware of any of the alleged deficiencies in the original list as noted by a Regional Board staff member and discussed above in this Order. In any case, Plaintiffs argue that he had a duty to monitor stormwater discharges and update the list if warranted.

From this record, it appears that unresolved material questions of fact could support a finding that Defendant is failing to effectively implement its SWPPP by failing to conduct sufficient reports and testing, and by taking insufficient action to minimize non-stormwater discharges.

6. Plaintiffs allege that Defendant continues to fail to gather at least two samples per rainy season, and that Defendant continues to fail to collect samples from all locations where stormwater is discharged, or, in the alternative, establish that stormwater discharges from different locations are substantially identical. Plaintiffs provide a report submitted by Defendant to the Regional Board in June 1996. Question 9 of the Report asks:

> Section B.5.d of the General Permit requires that stormwater samples from at least two storms be collected and analyzed. a. How many storms did you sample? Answer: 0 (NONE). b. How many stormwater discharge points are located at your facility? Answer: 5. Did you sample from every discharge point? Answer: No. If you did not sample from every discharge point, attach an explanation why you did not or attach a

justification as to why certain discharge points are substantially identical.

Pla.'s NOL Ex. 1, p. 4. Plaintiffs allege that Defendant did not attach any explanation or justification.

Furthermore, Plaintiffs point to the stormwater analyses conducted by Defendant between 1992-1997, as noted above. These reports indicate substantially different results at different outfalls from nearly contemporaneous samples. Pla. Supp. NOL Ex. 18, p. 57. Finally, Plaintiffs note that Defendant conducted only one sample during the 1996-97 rainy season.

Defendant argues that a new stormwater diversion system has eliminated additional discharges at some point after the February samples were taken. This argument suggests that the new system eliminates stormwater discharge. Because the monitoring rquirements of the SWPPP have not been followed in the past, Defendant should bear the burden of establishing this argument. At this stage, these claims will not be dismissed.

7. Plaintiffs allege that Defendant's Daily BMP Inspection Reports and water pollution Incident Reports reveal numerous recurring and ongoing problems at the facility.

Plaintiffs allege a series of one-time violations reported in Defendant's BMP reports that allegedly illustrate a pattern of infraction. These claims include: (a) improper storage and containment of paint (8/16/96 to 8/28/96); (b) piles of grit on the railways (9/10/96 to 9/17/96); (c) sandblast grit all over pier (3/16/97); (d) unsatisfactory containment of paint cans and blast media (9/21/94); and (e) blast grit remaining on chain barge (7/26/94 to 10/6/94).

Defendants claim that none of these conditions would violate the BMP or SWPPP. While the plans do require good housekeeping and cleanup of most conditions, Defendants further allege that Plaintiffs submit no evidence

that Defendant failed to clean up the violations as required by the plans and permits.

From the water pollution Incident Reports, Plaintiffs cite: (a) non-stormwater discharges noted by the U.S. Navy and Defendant employees (11/5/96 to 11/22/96); (b) repeated observations of the discharge of a cloudy substance (3/10/97 to 3/19/97); (c) reports of abrasive blast and aluminum oxide discharges (5/15/96 to 5/16/96); (d) discharged of two trash bags containing ten pounds containing paint chips, dirt and mixed debris (3/16/94); and (e) allowing run-off to occur from dry-dock (1/29/96).

Defendant argues that the discharges noted by the Navy do not implicate any violations of the BMP; that the cloudy substance was discharged by a Navy ship, not Defendant; that the blast and aluminum oxide allegations would not constitute BMP violations; and that the dry-dock allegations were not supported by any evidence.

Both parties provide only cursory analysis of their point-by-point positions on ten allegations listed in this subsection. However, possible violations of permits cannot be ruled out on the record before the Court. Plaintiffs have provided some evidence of violations through the incident reports, which is all that they are required to do to survive Defendant's motion for summary judgment.

Defendant has not shown that Plaintiffs have failed to present sufficient evidence from which a reasonable fact finder could find a continuing likelihood of recurrence in intermittent or sporadic violations. Furthermore, the Court finds that Defendant has failed to meet the heavy burden required to make a showing that Plaintiffs' claims are moot. Given Defendant's history of violations, it is far from absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. Therefore, Defendant's motion for summary judgment is DENIED.

IV. Conclusion

For the reasons set forth above, Defendant's motion for summary judgment is DENIED. Defendant's two motions to strike evidence in support of Plaintiff s opposition are also denied. The Court notes that trial has been scheduled for July 7, 1998. In the interim, it will be important that Plaintiffs are able to continue to monitor and observe conditions at Defendant's facility. The Court requests that Defendant cooperate with all further reasonable discovery requests, and further requests that the Magistrate Judge take such action as is necessary to expedite ongoing discovery and observation.

IT IS SO ORDERED.

DATED: [Nov. 26, 1997] /s/ Rudi M. Brewster
UNITED STATES DISTRICT JUDGE

cc: All Parties
Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 96-1492-B

Natural Resources Defense Council,
San Diego BayKeeper, Kenneth J. Moser,
Plaintiffs,

v.

Southwest Marine, Inc.,
Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

FILED: November 5, 1996

This matter came on regularly for hearing upon defendant's motion to dismiss for lack of subject matter jurisdiction. After due consideration of the moving and opposing papers, the Court hereby DENIES defendant's motion to dismiss.

I. Background

Plaintiffs Natural Resources Defense Council, Inc. ("NRDC"), San Diego Baykeeper, Inc. ("SDB"), and Kenneth Moser ("Moser") filed suit against Southwest Marine, Inc. ("Southwest") for allegedly violating numerous provisions of the Clean Water Act, 33 U.S.C. § 1365. Plaintiffs allege (1) that Southwest's unlawful and excessive

discharges of water pollution from its bayside facility contribute noxious pollutants to, and harm, the San Diego Bay and the Pacific Ocean, and (2) that Southwest has failed to prepare and implement several environmental compliance and monitoring plans required by the Clean Water Act.

Plaintiffs allege that on April 30, 1996, they gave defendants and various federal and state officials notice of the alleged violations and of their intent to file suit as required by 33 U.S.C. § 1365(b)(1)(A). They further allege that more than sixty days have passed since notice was provided, but neither the EPA, nor any state or regional environmental regulatory agency has commenced and diligently prosecuted a court or administrative action to redress the violations alleged in the notice letter. Complaint §§ 4-5. Southwest contends that plaintiffs' notice letter did not provide them with any information regarding the date, location, or any activity that they allege constitutes a violation of the Clean Water Act.

The notice letter states:

> The information currently available to us indicates that Southwest Marine and the Port District have violated and continue to violate requirements concerning discharges from the Southwest Marine facility at the foot of Sampson Street in the City of San Diego. These requirements, including requirements related to discharges associated with or ancillary to industrial manufacturing and treatment, are embodied in the Act, its implementing regulations, and National Pollutant Discharge Elimination System ("NPDES") Permit No. CA0107697.... The requirements with which we believe Southwest Marine and the Port District have failed to comply are set forth in Attachment 1 to this letter.

> Additionally, the information currently available to us indicates that Southwest Marine and the Port District have violated and continue to violate NPDES General Permit No. CAS000001 governing stormwater discharges associated with industrial activities in California ... The General Industrial Permit requirements with which we believe Southwest Marine and the Port District have failed to comply are set forth in Attachment 2 to this letter.

The attachments then set forth the specific provisions of the NPDES permits and the Code of Federal Regulations ("CFR") which Southwest has allegedly violated. Attachment one alleges that Southwest: (1) failed to develop and implement a Best Management Practices plan by (a) failing to establish specific objectives for control of toxic and hazardous pollutants by predicting direction, rate of flow and total quantity of pollutants, and (b) failing to meet material inventory, material compatibility, reporting and notification, visual inspection, preventive maintenance and security requirements; (2) released concentrations of toxic substances in waters that produce detrimental physiological responses in human, plant, animal or aquatic life; and (3) failed to submit a complete permit application. Attachment two alleges that Southwest: (1) released stormwater that adversely impacted human health or the environment, or that caused or contributed to a violation of any applicable water quality standards; (2) failed to develop and implement a Stormwater Pollution Prevention Plan; and (3) failed to develop and implement a monitoring and reporting plan. Plaintiffs provide specific deficiencies in defendant's Stormwater Pollution Prevention and monitoring and reporting plans.

II. Discussion

A. Governing Law

Title 33 U.S.C. § 1365(b) provides:

No action may be commenced-

> (1) under subsection (a)(1) of this section(A) prior to sixty days after plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order.

Under federal regulations, the notice must include sufficient information to allow the recipient to

> identify the specific standard, limitation or order alleged to have been violated, the activity alleged to constitute a violation, the persons or person responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving the notice.

40 C.F.R. § 135.3(a); see Washington Trout v. McCain Foods, Inc., 45 F.3d 1351, 1353 (9th Cir. 1995) (applying regulation).

Providing an adequate 60-day notice is a jurisdictional prerequisite to maintaining suit. Hallstrom v. Tillamook County, 493 U.S. 20, 26 (1989) (analyzing an identical provision in the Resource Conservation and Recovery Act and holding that "[u]nder a literal reading of the statute, compliance with the 60-day notice provision is a mandatory, not optional condition precedent for suit."); Washington Trout, 45 F.3d at 1353-54 (applying Hallstrom to the Clean Water Act ("CWA') 60-day notice provision). The Ninth Circuit has required strict adherence to the statutory notice requirements. In Washington Trout, the notice failed to identify two of the plaintiffs. The Court held that this was improper notice and dismissed the entire suit for lack of subject matter jurisdiction. 45 F.3d at 1354-55.

The purpose of the 60-day notice requirement is (1) to allow the alleged violator time to come into compliance with the CWA, (2) to give the alleged violator an opportunity to

negotiate a resolution to the dispute, and (3) to give state and federal environmental regulatory agencies an opportunity to enforce their laws and regulations. Hallstrom, 493 U.S. at 29; Washington Trout, 45 F.3d at 1354.

B. Plaintiffs' Notice Letter

Southwest argues that plaintiffs' notice letter fails to meet the requirements of 40 C.F.R. § 135.3(a) in that it does not identify (1) the specific standards at issue, (2) the activities which gave rise to the alleged violations, (3) the persons responsible for the alleged violations, (4) the location of the alleged violations, (5) the dates of the alleged violations, and (6) the full name of the person giving notice.

Plaintiffs respond that these standards were designed to apply to citizen suits challenging discharges which violate the CWA. In this suit, while plaintiffs do allege illegal discharges, plaintiffs are primarily challenging defendant's failure to develop and implement a Best Management Practices Program ("BMP"), a Storm Water Pollution Prevention Plan ("SWPPP"), and a monitoring and reporting plan as required by the CWA. Challenging the failure to develop and implement these programs is far different than challenging specific instances of illegal discharge. In City of New York v. Anglebrook Ltd. Partnership, the court reviewed the adequacy of the 60-day notice given prior to a challenge to the sufficiency of a SWPPP. 891 F.Supp. 900, 906-08 (S.D.N.Y.1995). Plaintiffs had alleged that the SWPPP violated five categories of conditions, such as failure to describe stormwater controls, failure to describe sedimentation and erosion controls, etc. The Court held that the notice provided complied with 40 C.F.R. § 135.3(a).

> First, the Notice Letter gave notice of the alleged violation because it identified five specific categories of standards required under the permit and allegedly

> violated. Second, the letter's assertion that the SWPPP violated the General Permit is an adequate statement of the activity that constitutes the violation. Third, the letter identifies the Defendants as the "persons responsible for the alleged violation." Fourth, the letter adequately describes the location of the alleged violation because the violations are within the SWPPP itself.

Anglebrook, 891 F. Supp. at 907-08.

The plaintiffs in this case meet the requirements of 40 C.F.R. § 135.3(a) for the same reasons. First, the plaintiffs' notice letter specifically identifies three standards that the SWPPP violates, six standards that the monitoring and reporting plan violates, and two standards that the BMP plan violates. See Complaint, Exh. 1, Attachments 1 & 2. For each alleged violation, the letter states the prohibited actions and the regulations and NPDES permit provisions which it violates.

Second, the letter's assertion that the SWPPP, the BMP plan, and the monitoring and reporting plan violate these standards is an adequate statement of the activity that constitutes the violation. The defendant's failure to prepare and implement legally sufficient environmental compliance plans is the activity that constitutes the violation. When describing the failure to perform an act, it is impossible to describe the time, date, activities and persons responsible with the same specificity used when describing an affirmative act. Plaintiffs can only allege who was supposed to act, what they were supposed to do, and that they have failed to do it. Plaintiffs have done this.

Third, the letter adequately alleges that Southwest is the person responsible for the failure to prepare and implement a SWPPP, a BMP plan and a monitoring and reporting plan. The notice letter was sent to Southwest and

the Port of San Diego, alleging that violations of the CWA were the responsibility of both parties.

Fourth, the letter adequately describes the location of the alleged violations because the violations are within the SWPPP, the BMP and the monitoring and reporting plans themselves. Further, the notice letter states that the violations occurred at Southwest's corporate headquarters at the foot of Sampson Street in San Diego, California. The alleged violations involve the failure to prepare and implement plans for the entire Southwest facility at this location. Again, this is not like a discharge from one pipe at an industrial location. This suit is about the failure to prepare environmental compliance and monitoring plans for an entire facility. In this case, it is legitimate to allege that the violations are occurring at the facility in general, because the facility has not implemented the proper CWA plans.

Fifth, the deficiencies in these plans are ongoing, so there is no specific date that can be alleged as the date of the violation. As long as Southwest operates without a legally adequate BMP, SWPPP, or monitoring and reporting plan, the violations will continue each and every day. Contrast this with the normal citizen suit where plaintiffs are suing over specific, discrete discharges which occur over a finite period. See California Sportfishing v. City of West Sacramento, 905 F. Supp. 792 (E.D. Cal. 1995).

Sixth, the notice letter provides sufficient information to identify the parties and their counsel. The letter (1) states that it is being sent on behalf of NRDC and San Diego Baykeeper, (2) provides the full name and addresses of both NRDC and San Diego Baykeeper, and (3) is signed by Everett DeLano, III, Senior Project Attorney for San Diego Baykeeper and NRDC, and Ken Moser, Executive Director of San Diego Baykeeper. Southwest argues that the letter fails to clearly identify that Moser would be a plaintiff in this action along with NRDC and SDB. Washington Trout held

that plaintiff s notice letter was deficient because it did not contain the names of two plaintiffs in the subsequent court action. 45 F.3d at 1354. In that suit, however, the two omitted plaintiffs became the only two plaintiffs in the court action. The Ninth Circuit reasoned that, absent the names of these two parties, the notice letter did not provide defendants or regulators adequate information regarding with whom they needed to negotiate. Id. In this case, however, not only did Moser sign the letter, but he remains Executive Director of San Diego Baykeeper, one of the other plaintiffs in the suit. There can be no doubt about with whom Southwest needed to conduct negotiations.

Southwest's argument that the failure to put "Inc." after NRDC and San Diego Baykeeper constitutes improper notice is patently frivolous.

III. Conclusion

Defendant continually stresses the need to satisfy all of the technical requirements of 40 C.F.R. § 135.39(a). As the court in California Sportfishing stated:

> The language of the regulation does not suggest that the notice may be good enough if it generally orients the agency or violator as to the type of violation ... [T]he recipient must be able to determine the "specific standard *alleged* to have been violated," the location of the *"alleged* violation," and the *date* or *dates* "of such violation."

905 F. Supp. at 799.

Defendant's argument is not meritorious. First, this case involves the preparation and implementation of several environmental compliance and monitoring plans, not the discrete discharge of some pollutant; and second, this case involves a failure to act, rather than an affirmative act. The combination of these two factors requires a different application of the regulation. It is impossible to allege with specificity the actions taken, their location and date, when

dealing with inaction. As explained earlier, only what action should have been taken, who should have taken it, and that they have not taken the action, can be alleged. Plaintiffs do just this. Moreover, when dealing with plans that govern compliance and monitoring at an entire facility, the proper location is the entire facility, and the responsible parties are the facility and its managers.

Defendant points to the regulations without really analyzing what the case is about and whether the notice letter it received really apprised it of the issues and claims that would be raised in the lawsuit. From reading the notice letter, it is clear that plaintiffs told defendant that they were going to sue defendant because it had not developed or implemented a SWPPP, a BMP plan, or a monitoring and reporting plan. Defendant cannot now complain that it was surprised by this, or that it did not know with whom it was supposed to negotiate.

In sum, plaintiffs' notice letter contains allegations that meet the requirements of 40 C.F.R. § 135.3(a). For this reason, defendant's motion to dismiss for lack of subject matter jurisdiction is DENIED.

IT IS SO ORDERED.

DATED: [Nov. 4, 1996) /s/ Rudi M. Brewster
United States District Judge

UNITED STATES CODE ANNOTATED
TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26--WATER POLLUTION PREVENTION AND CONTROL
SUBCHAPTER V--GENERAL PROVISIONS

§ 1365. Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced-

(1) under subsection (a)(1) of this section-

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; United States interests protected

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(3) Protection of interests of United States

Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

(d) Litigation costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title.

(g) "Citizen" defined

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) Civil action by State Governors

A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

UNITED STATES CODE ANNOTATED
TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26–WATER POLLUTION PREVENTION AND CONTROL
SUBCHAPTER III—STANDARDS AND ENFORCEMENT

§ 1319. Enforcement

***

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

CODE OF FEDERAL REGULATIONS
TITLE 40-PROTECTION OF ENVIRONMENT
CHAPTER I-ENVIRONMENTAL
PROTECTION AGENCY
SUBCHAPTER D--WATER PROGRAMS
PART 135--PRIOR NOTICE OF CITIZEN SUITS
SUBPART A--PRIOR NOTICE UNDER THE
CLEAN WATER ACT

§ 135.3 Contents of notice.

(a) Violation of standard, limitation or order. Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.

(b) Failure to act. Notice regarding an alleged failure of the Administrator to perform any act or duty under the Act which is not discretionary with the Administrator shall identify the provision of the Act which requires such act or creates such duty, shall describe with reasonable specificity the action taken or not taken by the Administrator which is alleged to constitute a failure to perform such act or duty, and shall state the full name, address and telephone number of the person giving the notice.

(c) Identification of counsel. The notice shall state the name, address, and telephone number of the legal counsel, if any, representing the person giving the notice.

No. 00-1459

Supreme Court, U.S.
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MAY 10 2001
OFFICE OF THE CLERK

In The

Supreme Court of the United States

SOUTHWEST MARINE, INC.,

Petitioner,

v.

SAN DIEGO BAYKEEPER, NATURAL RESOURCES DEFENSE COUNCIL and KENNETH J. MOSER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly affirmed the District Court's finding that Respondents' citizen suit notification letter alleging multiple violations of the Clean Water Act ("CWA") satisfied the jurisdictional prerequisites established by 33 U.S.C. § 1365(b)(1)(A) where the pre-suit notice letter not only set forth all of the information called for by the applicable regulations, but where Petitioner *conceded* in the appellate court that many of the allegations in the notice letter were adequate to satisfy the requirements of the CWA and where Petitioner actually *did* understand the allegations contained in the notice and attempted to remedy some of the violations of which Respondents had complained?

2. Whether the Court of Appeals properly held that the District Court did not abuse its broad discretion in fashioning equitable relief, where, upon finding that Petitioner had violated and was continuing to violate its NPDES permits and the CWA by not adequately implementing its pollution prevention plans, the District Court issued a narrowly-tailored injunction that was reasonably calculated to achieve compliance with the CWA and to enforce the terms of Petitioner's permits by mandating certain specific remedial actions that were completely consistent with, and complementary to, those existing permit requirements?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Natural Resources Defense Council, Inc., is a New York non-profit corporation, with no parent companies or subsidiaries. Respondent San Diego BayKeeper, Inc., is a California non-profit corporation, with no parent companies or subsidiaries. No parent company or publicly held company owns 10% or more of the Respondents' stock.

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STATEMENT OF THE CASE

Respondents concur with Petitioner Southwest Marine, Inc.'s recitation of the Opinions Below, Jurisdiction, and Constitutional and Statutory Provisions Involved. The regulatory background and history of this litigation are fully and accurately set forth in the Court of Appeals' comprehensive opinion. Appendix to Petition ("Pet. App."), 2a-10a, reported at *Natural Resources Defense Council et al. v. Southwest Marine, Inc.*, 236 F.3d 985 (9th Cir. 2000).

REASONS FOR DENYING THE WRIT

This petition for a writ of certiorari seeks review of the unanimous decision of the Ninth Circuit Court of Appeals (Judges Kozinski, Graber and Fisher) culminating almost five years of litigation by Respondents Natural Resources Defense Council, San Diego BayKeeper, and Kenneth Moser ("Respondents") under the citizen suit provisions of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1386, against Petitioner Southwest Marine, Inc. ("Southwest" or "Petitioner"), the largest non-nuclear shipyard in the country. The gist of Respondents' enforcement action under the CWA was that Petitioner's statutorily mandated pollution prevention plans, although nominally in existence, were legally inadequate and were not being implemented so as to reduce and eliminate pollution of San Diego Bay, as required by law.

This case was closely supervised in the trial court by United States Senior District Judge Rudi M. Brewster, who visited the shipyard on three occasions, actively

presided over a three-and-a-half-week bench trial, and concluded that Southwest's violations of law were polluting San Diego Bay to the extent of creating a "dead zone" that was "devoid of life." After balancing the appropriate factors, Judge Brewster imposed a civil penalty against Southwest pursuant to 33 U.S.C. § 1319(d) and ordered a variety of site modifications, operational changes, and inspection and monitoring practices designed to remedy Southwest's violations of the CWA and to ensure compliance with the relevant requirements of its National Pollutant Discharge Elimination System ("NPDES") permits and plans. The District Court's judgment (together with its order temporarily staying a limited portion of that judgment) was unanimously affirmed by the Ninth Circuit Court of Appeals, which rejected Petitioner's multiple claims of error, including its challenges not only to the District Court's rulings on the adequacy of notice and the appropriateness of the injunctive relief ordered, but also to Respondents' standing, to the court's subject matter jurisdiction, to the evidence of ongoing violations at Petitioner's facility, and to the amount of the civil penalty imposed on Southwest for the violation of its permit conditions.[1]

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[1] Southwest subsequently filed yet a third appeal in this case, challenging the propriety of the District Court's order modifying some of the terms of its injunction while Southwest's initial appeals were pending. That appeal was heard by an entirely different panel of the Ninth Circuit Court of Appeals (Judges Canby, Thompson, and Pregerson), which unanimously rejected Petitioner's arguments as well. *See Natural Resources Defense Council et al. v. Southwest Marine, Inc.*, 242 F.3d 1163 (9th Cir. 2001).

The petition for a writ of certiorari in this case raises no issue meriting this Court's review. The opinion of the Court of Appeals below breaks no new legal ground, but merely applies established precedents to the peculiar factual circumstances of Petitioner's shipyard facility and the narrative provisions of its Clean Water Act permits. Petitioner Southwest does not even attempt to argue that there is a conflict among the circuits on any issue presented, because plainly no such conflict exists. Nor, despite Petitioner's overblown rhetoric, does the petition raise any questions of national significance in the administration of the Clean Water Act. Southwest can point to no recurring or widespread impact from the Court of Appeals' fact-bound decision other than Petitioner's own exaggerated and unsupported claim that the decision below "eviscerates the citizen suit notice requirement and upsets the balance carefully struck by Congress between public and private enforcement of the Clean Water Act." Petition ("Pet."), at 18.

Southwest nevertheless insists that its petition for a writ of certiorari should be granted because the Court of Appeals' opinion supposedly conflicts with this Court's prior precedents under the Clean Water Act and other similar federal environmental statutes. But the cases from this Court upon which Southwest bases its claimed conflicts do not in any way support Petitioner's arguments. With respect to the adequacy of the pre-suit notice letter, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 52-53 (1987), does not even address the question, whereas *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989), involved a failure of the plaintiffs to provide *any notice whatsoever* to the government enforcement

agencies until after suit had been commenced. To argue that the Court of Appeals' decision in the present case – in which Respondents indisputably provided a detailed pre-suit notice letter to all of the requisite entities – somehow conflicts with this Court's rulings in *Gwaltney* or *Hallstrom*, stretches the holdings of those cases beyond reason.

Similarly, on the issue of the trial court's equitable jurisdiction, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313, 318 (1982), and more recently *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 193 (2000), affirm the District Court's broad equitable discretion to remedy proven violations of the Clean Water Act. The principal cases urged by Southwest to conflict with the Court of Appeals' decision below, *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981), and *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), held that the Clean Water Act preempted the federal and state common law of nuisance; again, those decisions did not even address the scope of a federal court's equitable powers under the Clean Water Act – the question presented here – much less resolve that issue in any way that was inconsistent with the Court of Appeals' opinion in this case.

In sum, Petitioner has vainly attempted to concoct cert-worthy legal issues out of what are, at bottom, heavily fact-bound and mundane disputes over the adequacy of Respondents' notice letter and the reasonableness of some of the terms of the trial court's remedial injunction. The District Court and the Court of Appeals properly resolved these disputes in Respondents' favor and adversely to Petitioner. But even if this diverse group of judges could somehow be said to have erred in their

application of the law to the specific facts of this case, there is nothing in the Court of Appeals' unanimous opinion that warrants further review by this Court. Granting the petition for a writ of certiorari would only prolong a case that has already dragged on for far too long, fueled by a dissatisfied, intractable litigant. The petition should be denied.

I. THE COURT OF APPEALS' DECISION UPHOLDING THE ADEQUACY OF RESPONDENTS' PRE-SUIT NOTICE LETTER IN NO WAY CONTRAVENES THE CLEAN WATER ACT OR THIS COURT'S PRECEDENTS.

A. Respondents' Pre-Suit Notice Letter Included All of the Requisite Information Regarding the Specific Activities Alleged To Constitute the Violations of Petitioner's NPDES Permits.

Petitioner contends that the Court of Appeals' decision upholding the sufficiency of Respondents' notice letter cannot be reconciled with the requirements of the Clean Water Act and its implementing regulations or with this Court's precedents involving the citizen suit notice provisions contained in many federal environmental statutes. Specifically, Petitioner contends that Respondents' notice letter was "completely devoid of any information about the actual activities that respondents believed to constitute a violation of petitioner's NPDES permits" (Pet. at 11), that it did not "give EPA and the prospective defendant fair warning of what the case will be about" (*id.* at 14), and that consequently the notice letter did not fulfill the objectives of Congress in imposing the 60-day notice requirement, as identified by this Court in

Gwaltney, 484 U.S. at 52-53 and *Hallstrom*, 493 U.S. at 29. Pet. at 14.

Both the District Court and the Court of Appeals properly rejected Petitioner's challenge to the adequacy of the Respondents' 60-day notice letter, finding that the notice satisfied the statutory conditions of 33 U.S.C. § 1365(b)(1)(A) and the EPA's implementing regulations, which require that the notice "shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, [and] the activity alleged to constitute a violation. . . . " 40 C.F.R. § 135.3(a).

Aside from identifying, by both citation and title, the specific provisions of the Clean Water Act and the two NPDES permits that Petitioner was alleged to be violating (Pet. App. 28a-35a), the notice letter advised that Southwest had failed to develop and implement a Storm Water Pollution Prevention Plan ("SWPPP") in accordance with Part C.2 and Section A of its 1992 General Industrial NPDES Permit, which requires that storm water plans be developed and implemented with the "Best Available Technology Economically Achievable" for toxic and nonconventional pollutants ("BAT"), and with the "Best Conventional Control Technology" ("BCT") for conventional pollutants.[2] *See* Pet. App. 34a-35a (Notice Letter Attachment 2); Appellant's Excerpts of Record ("ER") 118-120

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[2] Rather than relying on numeric effluent limitations, Petitioner's Clean Water Act permits require the company to develop and implement Best Management Practices ("BMPs") "to prevent or reduce the pollution of waters of the United States." 33 U.S.C. § 1314(e); 40 C.F.R. § 122.2. As the Court of Appeals noted, BMPs are narrative limitations employed when

(1992 General Industrial NPDES Permit, Section A); 33 U.S.C. §§ 1311(b)(2)(A) & (E).

The notice letter specifically alleged that Southwest's shipyard had failed to implement certain Section A.5 stormwater management controls appropriate for the facility, including not only "good housekeeping" controls,[3] but also preventive maintenance, spill prevention and response, storm water management practices, erosion and sediment controls, and inspections. Pet. App. 34a. For each of those referenced controls, Section A.5 identifies specific pollution management practices that are required. ER 119-120 (1992 General Industrial NPDES Permit, Section A.5). For example, the "Good Housekeeping" permit provision specifically required the maintenance of clean and orderly facility areas through regular inspection and cleaning (Section A.5.c); "Preventive Maintenance" required inspection and maintenance of stormwater conveyance systems and inspection and testing of all systems that could fail and allow discharge of

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numeric effluent limitations are infeasible. Pet. App. 34a; *see Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1380 (D.C. Cir. 1977).

[3] Southwest concedes that good housekeeping is "[p]aramount in the application of storm water pollution prevention . . . [and that the shipyard] relies heavily upon good housekeeping procedures to ensure that storm water which flows from the surfaces of the shipyard are pollutant free to the maximum extent possible." Appellees' Supplemental Excerpts of Record ("SER") 125 (Southwest's 1998 BMP Program Manual, BMP-101 "Good Housekeeping"). However, the "Good Housekeeping" provision was by no means the only provision of Petitioner's permits referenced in Respondents' notice letter that corresponds to the District Court's findings of violations.

pollutants to storm water (Section A.5.b); "Storm Water Management Practices" required material handling and clean-up procedures, and assessment of the necessity of additional controls (Section A.5.e); and "Inspections" required performance of all required inspections, and tracking and follow-up procedures to ensure appropriate response action is taken (Section A.5.h). *Ibid.*

Respondents' letter also alleged that Petitioner had failed to adequately develop and implement a Storm Water Pollution Monitoring Plan ("SWPMP") in accordance with Part C.3 and Section B of its 1992 General Industrial NPDES Permit. Pet. App. 35a. Respondents alleged Petitioner's failure to conduct required annual site inspections (Section B.5.a), to conduct visual observations of all stormwater discharge locations during the first hour of each significant stormwater discharge event per month (Section B.5.c), to analyze for toxic pollutants likely to be present in stormwater runoff (Section B.5.d.ii.), to collect samples from all discharge locations, or to establish similarity between them (Section B.11), and to notify the Regional Board of any non-compliance (Section B.17). *Ibid.* Petitioner was also notified that its stormwater discharges were adversely impacting the environment in violation of Part B.1 of its 1992 General Industrial NPDES Permit.[4] Pet. App. 34a.

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[4] Petitioner falsely accuses the Court of Appeals of resting its opinion upholding the adequacy of Respondents' notice in this case on "one isolated phrase in Attachment 2 to the notice letter" – the "good housekeeping" requirement. Pet. at 12-13. The notice letter, however, plainly alleges 7 other specific types of storm water management control deficiencies (Pet. App. 34a) and 6 specific types of inspection and monitoring deficiencies

Respondents' notice letter thus contained sufficient information to advise both Southwest and the appropriate government enforcement agencies of the specific activities – or, perhaps more properly in this case, the specific *inactivities* – that were alleged to constitute a violation of the CWA and of Southwest's NPDES permit requirements. Significantly, the letter did not incorporate the permits in their entirety, but rather identified the particular provisions, containing particular management commands, that Southwest was alleged to have violated by not developing and implementing legally adequate SWPPP, SWMP, and BMP plans. As the District Court recognized, where the alleged violation consists of the failure to perform a required act (such as the failure to prepare and implement legally sufficient environmental compliance plans), it is impossible to describe the activity that constitutes the alleged violation with the same specificity that might be used when describing an affirmative act (such as engaging in or permitting a specific illegal

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(Pet. App. 35a). Consistent with these allegations, the District Court found not only housekeeping violations, but inspection, reporting, record keeping, and responsive action violations. Pet. App. 65a-66a.

The Court of Appeals focused on the "good housekeeping" provision only because, as the Court noted, *Petitioner* had specifically contested the District Court's jurisdiction to consider Respondents' allegations of "poor housekeeping" on the ground that their notice letter had not sufficiently alleged any violation in this regard. Pet. App. 15a. The Court of Appeals then observed that Petitioner had conceded in its appellate brief that the District Court's reference to "poor housekeeping" (see Pet. App. 66a) did "arguably correspond" to Respondents' reference to storm water controls and "good housekeeping" requirements in Attachment 2 of the notice letter. Pet. App. 15a.

discharge). Pet App. 104a; *see City of New York v. Anglebrook Ltd. Partnership*, 891 F. Supp. 900, 906-08 (S.D.N.Y. 1995).

On the particular facts of this case, then, the Court of Appeals affirmed the District Court's conclusion that Respondents' notice letter – especially its allegation that Petitioner had failed to prepare and implement a SWPPP containing the "good housekeeping" provisions required by Southwest's 1992 General Industrial NPDES permit – described "the activity alleged to constitute a violation" (40 C.F.R. § 135.3(a)) with sufficient specificity to satisfy the requirements of the Clean Water Act. Petitioner can cite no decision from this or any other federal court suggesting that the Court of Appeals erred in this conclusion.

B. Petitioner's Concession That Respondents' Letter Provided Legally Sufficient Notice of How The Pollution Plans Needed To Be Reformed Is Completely At Odds With Its Implementation Argument Before This Court

Petitioner argues that "the specific standard, limitation, or order alleged to have been violated" and "the activity alleged to constitute a violation" must be interpreted to constitute separate notice requirements under 40 C.F.R. § 135.3(a). Pet. at 11. True as that may be, there is no reason why a reference in a notice letter to the "standard" that has been violated cannot also satisfy the requirement to describe the "activity" giving rise to the violation. This is especially true where, as here, the narrative requirements of Southwest's General Industrial Permit set forth not generic recitations of law but rather

specific management commands to which the shipyard must adhere using appropriate technology. In large measure, the proscribed activity is the very failure to adhere to the permit provisions themselves. Thus, to assert that the activity constituting the alleged violation can never be described by referencing the underlying legal standard is totally arbitrary and plainly incorrect.

Indeed, although it argued differently in the District Court, Petitioner conceded in the Court of Appeals that Respondents' notice letter *did* allege many of the Clean Water Act violations in sufficient detail so that it could understand and respond to them. Pet. App. 14a.[5] This appellate concession was significant, for if Respondents' notice letter was sufficient to inform Southwest of which provisions of its pollution plans were legally inadequate and how they needed to be fixed, there is no logical

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[5] In the District Court, Southwest attacked the sufficiency of the notice as to both the plan *preparation* and *implementation* violations, seeking to have Respondents' entire lawsuit dismissed. Pet. App. 99a-107a. It was only after the District Court found following trial that Petitioner's stormwater prevention plans had been brought into compliance "despite early deficiencies" (Pet. App. 65a) that Southwest conceded on appeal that, as to the plan *preparation* violations, the notice letter *did* sufficiently describe both the alleged standards violated and the activities constituting the violation. Appellant's Reply Brief at 7 ("It was apparent from the Notice Letter how defendants could cure the alleged deficiency."). Ironically, in this Court Southwest now *heralds* Respondents' plan preparation violation notice and the shipyard's laconic response to it as the very model of proper citizen-suit Clean Water Act procedure. Pet. at 16-17 n.4 (describing the notice letter and responsive actions taken by Southwest as an illustration of "how the citizen suit process is supposed to work.").

reason why Southwest should not likewise have understood what was needed to properly *implement* the identical provisions of those plans so as to effectively reduce the shipyard's pollution. The requirements to *prepare* an adequate pollution prevention plan and then to *implement* it properly are intimately related. *See* Pet. App. 13a. In fact, Southwest's environmental coordinator recognized precisely this fact, acknowledging at trial that upon receiving Respondents' notice letter, Southwest responded by examining *both* the provisions of its pollution prevention plans *and* the manner in which those plans were being implemented:

> We read it in detail several times. We looked at the references that the Notice Letter referred to, both in the Code of Federal Regulations and the California Storm Water Permit Regulations, requirements, and based on that, we compared it to the existing permit, the MPDS [sic] permit, and the storm water permit, *and the practices that we understood were being implemented at Southwest Marine.*

SER 1167 (emphasis added).

Having belatedly conceded that it understood what was wrong with its pollution prevention plans as written, Petitioner also should have understood (and actually did understand) how to implement those same provisions properly.

C. Petitioner Put Its Subjective Understanding of the Notice Letter In Issue And, In Any Event, Mischaracterizes the Court of Appeals' Use of That Evidence

Petitioner faults the Court of Appeals for allegedly "holding that a vague notice letter can be cured by extrinsic evidence of the defendant's reaction." Pet. at 16. As is evident from a review of the opinion, however, the Court of Appeals held no such thing. Rather, the Court merely observed as an evidentiary matter – and once again, only in response to Petitioner's own tender of that issue – that Southwest had obviously been able to understand the nature of at least some of the violations alleged in the notice letter, because it had proceeded to make substantial changes to its facility and operations, admittedly in an attempt to remedy some of the inadequacies identified by Respondents. Pet. App. 16a. The Court of Appeals never held as a legal principle that an otherwise impermissibly vague notice letter can be "cured" or "supplemented" by reference to any subsequent remedial actions taken by the defendant (*see* Pet. at 16); the Court simply noted as an evidentiary matter that Petitioner's response to Respondents' notice letter made clear that it was perfectly capable of understanding the nature of the violations alleged therein and the actions required to remedy them. Pet. App. at 16a.

The Court of Appeals was fully justified in considering this evidence as it related to the credibility of Petitioner's trial and appellate contentions regarding the shipyard's actual understanding of Respondents' letter. Both in the District Court and on appeal, Southwest put its post-notice conduct in issue, arguing not only that the

notice letter was facially deficient but that Petitioner was *subjectively unable to understand the letter. See* ER 1904-05 and 1911 (testimony of CEO Ewing); Appellant's Opening Brief at 41-42 and n.12. To this day, Southwest continues to assert, albeit unconvincingly, that the substantial changes it made to its pollution prevention plans were not "in response to" Respondents' notice letter, but that "NPDES permit holders like petitioner have complex environmental systems in place and are constantly reevaluating and seeking to improve them." Pet. at 17; *see also* Appellant's Opening Brief at 67, fn. 22.

Be that as it may, the critical point is that Petitioner lost this factual dispute in the courts below, and there was nothing improper about the Court of Appeals' considering Petitioner's remedial actions as further evidence of the adequacy of Respondents' notice. The District Court specifically found that the improvements to the shipyard's pollution prevention operations "were prodded in significant measure by this lawsuit." Pet. App. 60a. Southwest's own environmental compliance officer admitted as much on cross-examination (SER 1238-1242), completely contradicting the contrary testimony of Southwest's CEO. ER 1911. Having itself raised and presented evidence on this issue, Petitioner cannot now complain that the Court of Appeals considered the very evidence of post-notice conduct that it urged the court to consider, and that the Court viewed that evidence as corroboration that Respondents' notice was in fact understandable and adequate under the law. Pet. App. at 16a; *Atlantic States Legal Foundation v. Stroh Die Casting Co.*, 116 F.3d 814, 819-20 (7th Cir.), *cert. denied*, 522 U.S. 981 (1997) (concluding that notice was sufficient based in part

on remedial actions taken by the recipient after notice was received).

D. The Court of Appeals' Opinion Is Fully Consistent With This Court's Precedents Holding That the Citizen Suit Notice Requirements in Federal Environmental Laws Must Be Strictly Construed in Order to Serve Important Statutory Purposes.

Recognizing that the Court of Appeals' decision below creates no conflict among the circuits or with any statutory or regulatory provision regarding the issue of adequate notice, Petitioner tries to manufacture a conflict between the Court of Appeals' ruling and this Court's decisions in *Hallstrom* and *Gwaltney*. But there simply is no conflict. To the contrary, the Court of Appeals explicitly addressed those decisions, rendering a decision that was fully consistent not only with this Court's precedents, but with the underlying objectives Congress sought to achieve in imposing the statutory 60-day notice requirement.

Neither *Hallstrom* nor *Gwaltney* even remotely addresses the question of how much detail is required with respect to the *content* of a citizen suit notice letter. The Court's decision in *Gwaltney* did not involve the issue of pre-suit notice *at all*, but was instead concerned with whether citizen suits could be brought under the Clean Water Act to remedy wholly past violations of law. In holding that citizen-plaintiffs must allege a state of either continuous or intermittent violations in order to confer

federal jurisdiction, the Court relied in part on the language and structure of the Clean Water Act's notice provision, which the Court found was intended to give the alleged violator an opportunity to bring itself into complete compliance with the Act and thus make a citizen suit unnecessary – a purpose that would be rendered meaningless if citizen suits for wholly past violations were permitted. *Gwaltney*, 484 U.S. at 60. Beyond this general reference to the congressional intent underlying the notice provision, however, *Gwaltney* contains no discussion of the scope of the 60-day notice requirement.

Hallstrom, by comparison, does address the consequence of a wholesale failure to provide *any notice at all* to the relevant government enforcement agencies before a citizen suit is filed, holding that under the plain language of RCRA, the 60-day notice provision must be deemed to be a mandatory condition precedent for suit and may not be disregarded at a court's discretion. *Hallstrom*, 493 U.S. at 31. As the Court of Appeals in the present case recognized, however, the plaintiffs in *Hallstrom* had failed to comply with the facial requirements for notice set out in the applicable statute by providing no notice whatsoever to the relevant state and federal government agencies. The *Hallstrom* opinion said nothing about the specificity with which the offending activity must be described in a notice letter pursuant to 40 C.F.R. § 135.3(a), the issue presented in this case. *See* Pet. App. 17a-18a.[6]

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[6] Although neither *Gwaltney* nor *Hallstrom* address the issue of what constitutes an adequate notice under the applicable regulations, other courts *have* discussed this very issue in circumstances quite similar to those of this case. In

The conflict that Petitioner tries to manufacture is thus nonexistent. The Court of Appeals below expressly referred to this Court's decision in *Hallstrom*, emphasizing that "the CWA's notice requirement is strictly construed and that compliance with the notice requirement is a prerequisite to a citizen enforcement action." Pet. App. 17a-18a. The Court of Appeals likewise made explicit reference to *Gwaltney*'s holding that the CWA "does not permit citizen suits for wholly past violations," finding that Respondents had satisfied "*Gwaltney*'s threshold requirement for jurisdiction" by making a good-faith allegation of continuous or intermittent violations. *Id.* at 18a. There is simply no basis for Petitioner's assertion of a conflict between the opinion below and this Court's decisions in *Gwaltney* and *Hallstrom*.

Anglebrook, 891 F. Supp. at 901-02, 907, the district court considered the adequacy of notice for bringing a citizen suit under a storm water pollution prevention plan, and held that a notice letter alleging the defendant's "failure to insure maintenance of water quality standards in downstream waters," its "failure to describe appropriate controls and measures to be implemented at the construction site," and its "failure to describe storm water management controls" contained "an adequate statement of the activity that constitutes the violation." *See also Defenders of Wildlife v. Ballard*, 73 F. Supp. 2d 1094, 1097 (D. Az. 1999) (upholding adequacy of notice under Endangered Species Act). The District Court here appropriately followed *Anglebrook*, concluding that as in that case, Respondents' notice letter was adequate because it specifically identified the particular standards that Petitioner's pollution control plans allegedly violated, as well as the prohibited actions and the regulations and NPDES permit provisions for each alleged violation. Pet. App. 103a-105a.

To the contrary, it is Petitioner's insistence on achieving an unattainable precision and specificity in the content of a 60-day notice letter that would pose a conflict with this Court's precedents and contravene congressional intent. As this Court recognized in *Hallstrom*, the legislative history of the citizen suit notice provision "indicates an intent to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *Hallstrom*, 493 U.S. at 29. To that end, Congress directed that the notice provisions must not place "impossible or unnecessary burdens on citizens *but rather should be confined to requiring information necessary to give a clear indication of the citizens' intent.* These regulations might require information regarding the identity and location of the alleged polluter, *a brief description of the activity alleged to be in violation*, and the provision of law alleged to be violated." S. Rep. No. 92-414 at 80, 92d Cong. 1st Sess. (1971), 1972 U.S. Code Cong. & Admin. News 3668, 3745 (emphasis added). Petitioner's interpretation of the EPA's implementing regulations would not only supplant "the compromise struck by Congress" in adopting the citizen suit notice provision, *Hallstrom*, 493 U.S. at 29, but would undermine the entire purpose of the Clean Water Act as the primary vehicle for preventing and reducing pollution of the waters of the United States.[7]

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[7] Petitioners' contrary suggestion – that the Court of Appeals' decision will somehow result in a flood of frivolous "fishing expedition" citizen suits – is nothing short of fanciful. Federal courts have long possessed the wherewithal to deal with cases that are factually unsupportable. If Respondents'

In sum, the Court of Appeals and the District Court properly followed the teachings of *Hallstrom* and *Gwaltney* that the judicial interpretation of what is demanded by the notice regulation must not run afoul of the legislative purposes expressed by Congress in enacting the statutory notice requirement. The decisions below are fully consistent with this Court's precedents and Congress' intent. The petition for a writ of certiorari should be denied.

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case had been devoid of merit, it would have been thrown out at the summary judgment stage, if not earlier. *See* Pet. App. 77a-98a (District Court decision denying Petitioner's motion for summary judgment); *id.* 99a-107a (District Court decision denying Petitioner's motion to dismiss). These same mechanisms for achieving the prompt dismissal of non-meritorious actions would be available to any defendant in a citizen suit brought under the Clean Water Act. Moreover, there are significant financial and practical barriers that serve to discourage private citizens from initiating enforcement actions in the absence of a well-founded belief that the defendant is presently violating the environmental laws in a known manner; few individuals or organizations can afford to bear the cost and financial risks of years of litigation based upon the mere hope that they may ultimately discover that some initially-unknown violation has been committed.

II. THE COURT OF APPEALS PROPERLY HELD THAT THE DISTRICT COURT DID NOT ABUSE ITS EQUITABLE DISCRETION BY MANDATING THAT PETITIONER TAKE CERTAIN SPECIFIC REMEDIAL ACTIONS THAT WERE COMPLETELY CONSISTENT WITH, AND COMPLEMENTARY TO, ITS EXISTING PERMIT REQUIREMENTS

A. The Clean Water Act Does Not Divest Federal Courts of Their Traditional Equitable Powers To Order Relief Necessary to Achieve Compliance With the Act.

Petitioner challenges the scope of the remedial injunction that was issued by the District Court and upheld by the Court of Appeals, arguing in bold strokes that the Clean Water Act places all discretionary decision-making regarding compliance with the Act's standards in the hands of federal and state regulators, and that "courts cannot be permitted to interfere with that regulatory structure under the guise of common law rulemaking or the exercise of equitable discretion." Pet. at 19. On this point, Petitioner misstates both the reach of the courts' equitable powers under the Clean Water Act and the scope of the injunction entered by the District Court below: The courts' remedial authority is not as constrained as Petitioner suggests, and the injunction issued in this particular case is not nearly so broad and far-reaching as Petitioner complains.

"The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Hecht Co. v.*

Bowles, 321 U.S. 321, 329 (1944). This Court specifically considered the scope of Clean Water Act remedies in *Weinberger*, 456 U.S. 305, noting that "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Id.* at 313 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). The Court held that the Clean Water Act "permit[s] the exercise of a court's equitable discretion, whether the source of pollution is a private party or a federal agency, to order relief that will achieve compliance with the Act." *Weinberger*, 456 U.S. at 318.

More recently, in *Friends of the Earth*, 528 U.S. at 193, this Court reaffirmed that under the citizen suit provision of the Clean Water Act, "the district court has discretion to determine which form or relief is best suited, in the particular case, to abate current violations and deter future ones." *Accord, Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 986 (9th Cir. 1994) (district courts have "broad latitude in fashioning equitable relief when necessary to remedy an established wrong"). As the Court of Appeals recognized in its opinion below, that is precisely what the District Court did in this case, exercising its discretion to fashion the terms of a narrowly crafted injunction that it deemed necessary to abate Petitioner's ongoing violations of the Act and to deter future violations. Pet. App. 22a-25a.

Petitioner argued strenuously below that the District Court, upon finding that a condition of its NPDES permit had been violated, could do no more than issue an order reciting the terms of that particular permit requirement

and ordering Petitioner to comply with the provision.[8] *See* Pet. App. at 22a. The Court of Appeals quite properly disagreed, noting that "a district court's equitable authority is not so cramped." *Ibid.* Rather, the Court explained, "[s]o long as the district court's equitable measures are reasonably calculated to 'remedy an established wrong,' they are not an abuse of discretion." *Id.* at 22a-23a (quoting *Alaska Center*, 20 F.3d at 986).

Southwest's reliance upon this Court's decisions in *City of Milwaukee*, 451 U.S. 304, and *Ouellette*, 479 U.S. 481, is totally misplaced. *See* Pet. at 19-21. As this Court made clear in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), those decisions both dealt with the issue of the Clean Water Act's preemption of common law remedies for the abatement of nuisances caused by water pollution. In *City of Milwaukee*, this Court held that in enacting the Clean Water Act, Congress had intended to occupy the field of

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[8] There is no small irony in Petitioner's contention that the terms of the District Court's injunction must be limited to reciting and ordering compliance with the specifically-identified permit provisions. This is the same party, after all, that in the first argument of its certiorari petition insists that a notice letter that merely recites the language of the permit provision that is alleged to have been violated is so vague and meaningless that it provides the defendant with no "opportunity to bring itself into complete compliance with the Act." Pet. at 14 (quoting *Gwaltney*, 484 U.S. at 60). Petitioner does not explain why the same language that, in the context of the notice letter, is allegedly so unfathomable that Petitioner would not even know what remedial actions were being demanded of it should now suddenly be held to provide such sufficient guidance that the District Court must rely upon that language – and that language alone – to ensure compliance with the Act.

water pollution control and had preempted the federal common law of nuisance in that regard; accordingly, "there is no basis for a federal court to impose more stringent limitations than those imposed under the regulatory regime *by reference to federal common law.*" *City of Milwaukee*, 451 U.S. at 320 (emphasis added). Similarly, in *Ouellette*, this Court held that the Clean Water Act also preempts the common law of an affected state, at least to the extent that such common law seeks to impose liability for an interstate discharge from a point source in another state; the Court reiterated its concern that allowing lawsuits based upon common-law rules established by the different states would undermine the congressional scheme and subject discharge sources to "nuisance standards [that] often are 'vague' and 'indeterminate.' " *Ouellette*, 479 U.S. at 496.

City of Milwaukee and *Ouellette* thus have no bearing on this case. The District Court did not purport to entertain any cause of action or to issue any injunctive relief based upon the "vague" and "indeterminate" standards of the federal or state common law of nuisance. Rather, as the Court of Appeals recognized, the District Court's injunction was issued under the court's established authority under the Clean Water Act itself to order such relief as it deemed necessary to enforce the terms of Petitioner's NPDES permits and to remedy Petitioner's violations of the Act. The District Court neither abused its statutory discretion in that regard, nor usurped the authority of the executive-branch officials that issued the permits to Petitioner in the first place.

B. The Injunction Entered By the District Court Did Not Override or Exceed the Terms of Petitioner's Existing NPDES Permits, But Merely Enforced Those Permit Requirements By Giving Them Concrete Application in the Face of Petitioner's Continuing Violations of the Law.

Petitioner claims that the District Court "rewrote" and "ratcheted up" the requirements contained in its Clean Water Act permits, thereby usurping the role of the regulatory authorities charged with administering the Act. Pet. at 23. To support this claim, Petitioner disregards and distorts the record below in at least two key respects: (1) the District Court specifically found (in findings that were upheld by the Court of Appeals and that are not challenged by Petitioner in this Court) that Petitioner had violated and was continuing to violate its existing permit requirements, and that those violations had resulted in the contamination of San Diego Bay (Pet. App. 65a-67a); and (2) the injunctive measures imposed by the District Court did not "override" Petitioner's existing permit requirements, but were carefully crafted to give specific definition to, and to compel compliance with, those permit requirements in response to Petitioner's ongoing violations of law.

At the conclusion of the trial on the merits, the District Court found that the evidence showed "shoddy practices" and "a pattern of poor housekeeping" in Petitioner's implementation of its stormwater pollution prevention plans. Pet. App. 66a. Considering the cumulative evidence about Southwest's operations, the District Court found "a picture of overall inadequacies" in Petitioner's implementation of those plans. *Ibid.* The District Court

further found that "the implementation inadequacies have led to significant contributions of pollutants to [Petitioner's] leasehold and, as such, San Diego Bay," and that Petitioner's "failure to implement adequately its required plans has contributed to and perpetuated the contamination of the off-shore leasehold." *Ibid.* The District Court also noted that "[t]rial experts agreed that the off-shore leasehold is 'devoid of life.' " *Ibid.*

To address and remedy these violations, the District Court directed Petitioner to take a series of specific actions, broadly categorized by the court as "specific directives" and "physical plant improvements." *Id.* at 67a-71a. None of these directives, however, "override" Petitioner's governing NPDES permits, much less "usurp" the authority of the regulatory agencies. To the contrary, the District Court's orders give meaning to and enforce the terms of those existing permits by defining the precise activities that Petitioner must undertake to bring itself into compliance with the requirements of its permits and of the Clean Water Act itself. As the Court of Appeals explained – with an illustrative listing of the specific directives ordered by the District Court – all of the injunctive measures ordered by the court "are consistent with, and complementary to, [Petitioner's] existing permit requirements." Pet. App. 23a.[9]

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[9] For example, Petitioner has objected vociferously to the requirement that Southwest capture and divert contaminated stormwater runoff from its piers. *See* Pet. at 22-23; Pet App. 58a, 70a. Yet the evidence showed that Southwest's piers, used as "lay down" areas for heavy material, paints, spent blast grit, and other hazardous wastes, have been a "high risk" and chronic source of stormwater pollution. *See, e.g.*, SER 1195-96

The Court of Appeals was thus certainly correct when it ruled that the District Court acted within its broad equitable discretion under the Clean Water Act in ordering the specific measures it did – injunctive relief that was necessary to abate Petitioner's on-going permit violations and to remedy the polluted conditions in San Diego Bay.[10]

(admission during direct examination of Environmental Manager Austin); SER 1198-1203 (admission during his cross-examination); SER 781-84 (Hazardous Waste Incident Report regarding conditions on piers); SER 785-86 (Internal Memorandum criticizing Hazardous Incident Report as unjustifiably minimizing a serious problem); SER 809 (Letter from Southwest Environmental Compliance Coordinator Best, complaining of persistent disregard for housekeeping BMP on piers). In light of this evidence and the court's findings, the District Court was plainly within its discretion to order Petitioner to capture pier runoff from a five-year storm to abate the ongoing violations and to deter future violations at the shipyard. Pet. App. 38a. Moreover, as the Court of Appeals noted, the pier diversion requirement is "consistent with the [existing permit] requirement that [Petitioner] not discharge storm water that adversely affects the environment or degrades marine communities on [Petitioner's] leasehold, which the district court found had been rendered devoid of life by (among other things) [Petitioner's] discharges." Pet. App. 23a-24a.

[10] Almost as an aside, Petitioner argues that the District Court's imposition of a $799,000 civil penalty was excessive. But this argument also ignores the record. The District Court found that the violations committed by Petitioner were serious, that they perpetuated marine contamination and harmed marine life, that they were continuous throughout the litigation, that Petitioner had benefitted economically from its violations, and that the improvements that Petitioner had made during the course of the litigation were "prodded in significant measure"

CONCLUSION

Petitioner's claimed errors have been unanimously rejected by every judge that has considered them. The decisions of this Court upon which Petitioner attempts to manufacture a conflict simply do not support the arguments it raises. Nor is there any colorable claim to a conflict among the circuit courts of appeals on any material point in this case.

On the merits, the Court of Appeals and District Courts were correct in holding that Respondents' notice letter was adequate and in rejecting Petitioner's hypertechnical interpretation of the citizen suit notice requirements, which would allow the shipyard to escape liability for the severe pollution it has created. The Court of Appeals was likewise correct in upholding the trial court's broad discretion to fashion appropriate injunctive remedies for Petitioner's violations of the Clean Water Act.

In short, the Court of Appeals' opinion creates no new law, contravenes no decision of this or any other

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by Respondents' lawsuit. Pet. App. 52a-54a, 59a-61a. Consistent with its obligations under 33 U.S.C. § 1319(d), the District Court made other findings in mitigation of a more severe penalty. *Id.* at 52a-54a, 59a-61a. The District Court's penalty assessment was based upon substantial evidence in the record and fell well within the range of the court's discretion. Moreover, as Petitioner acknowledges (Pet. at 28), the District Court held that the civil penalty could be offset by the cost of Petitioner's implementation of the injunctive remedial measures ordered by the court. Pet. App. 60a-61a. As the Court of Appeals noted, this offset provision likely renders Petitioner's protestations a moot point. Petitioner has no legitimate basis for complaint.

federal court, and addresses no questions of national significance. The Court's decision is instead peculiar to the unique facts of Petitioner's shipyard facility and the narrative provisions of its permits. There is certainly no danger of "transforming the administration of Clean Water Act" if the Court of Appeals and District Court decisions are left to stand. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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